SUPREME COURT OF THE UNITED STATES.

No. 240.

ENOCH PIPER, APPELLANT,

vs.

GEORGE T. MOON ET AL.

BRIEF FOR APPELLANT.

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BOSTON:
ADDISON C. GETCHELL, LAW PRINTER,
53 WASHINGTON STREET,
1875.

BRIEF FOR APPELLANT.

This is an appeal from a final decree of the Circuit Court of the United States for the Southern District of New York.

Enoch Piper (the appellant) brought suit in equity in the Circuit Court against George T. Moon and others (the appellees), charging in his bill infringement by them of United States letters patent granted to him March 19 1861, for an improvement in the method of preserving fish and other articles, and praying injunction to restrain such infringement, and for profits and damages.

All the defendants named in the bill (the appellees) duly filed their answer, denying that the complainant was the original and first inventor of the said improvement, and alleging that the same was, before the invention thereof by the complainant, known to and used by various persons, and described in a certain printed publication named in the answer.

Replication was duly filed, and thereupon proofs were taken by complainant and defendants.

Upon hearing in the Circuit Court on pleadings and proofs it was decreed by the court that the bill be dismissed with costs to the defendants; from which decree this appeal was taken.

The defendants at the hearing contended that on the proofs the bill should be dismissed because of alleged public use of the improvement patented to the complainant as aforesaid, before the date of his invention thereof. 1st, in the process of freezing ice-cream; 2d, in certain apparatus alleged to have been devised and used by one William Davis, at Northwood and Columbus, Ohio, and Detroit and Adrian, Michigan.

The Error assigned by the appellant is, that the Circuit Court held, on the proofs, that the complainant was not the original and first inventor of the improvement patented to him as aforesaid, because of use thereof before the date of his invention thereof in the

process of freezing ice-cream, as appears by the opinion of the court (Rec. p. 279), and thereupon dismissed the bill.

CONSTRUCTION OF THE PATENT.

The patentee describes his invention as a *method* of preserving fish, &c.

The term "preserving" as used in the patent clearly includes *freezing and keeping frozen.*

The description and specification make the object of the invention plain. It is to provide a mode of freezing fish and other articles of food, and preserving them in a frozen state, by which they may be conveniently kept in any desired quantities and for any desired length of time.

The patentee refers to the common method of packing fish "with crushed ice in barrels or boxes," which, he says, "owing to the melting of the ice, and the consequent moistening of the fish, fails to preserve them fresh and good for more than a month at most."

He states that his invention "consists in a method of preserving fish and other articles by placing them within a chamber and cooling the latter [meaning of course the *air in it*] by means of a freezing mixture, so applied that no communication shall exist between the interior of the preserving chamber and that of the vessels in which the freezing mixture is placed;" and he says, "the *temperature* of the preserving chamber can be maintained for any length of time below the freezing point, and fish, *surrounded by this dry and freezing atmosphere*, will be preserved as fresh and good as when first caught, and for a much longer period than by any other method known to me."

He says that the *apparatus* for freezing the fish, &c., and keeping them in a frozen state may be constructed "*in various ways and of different shapes*," and that the apparatus shewn in the drawing will suffice to *illustrate* the principle and mode of operation. And afterward, "*I do not desire to be understood as confining myself to the use of the specific apparatus above described.*"

The described method is this: the atmosphere of the chamber in which the articles are placed, which is kept from communication with

the external air by means of non-conducting walls, is reduced to, and kept at, a temperature below the freezing point of water by means of a freezing mixture having no contact with the freezing atmosphere of the chamber; and the fish, &c., immersed in this atmosphere are frozen and kept so, and also kept from deterioration as if they were in a natural freezing atmosphere.

This atmosphere, in which the fish, &c., are frozen and kept, is described in the patent as a "*dry and freezing atmosphere.*"

The apparatus referred to for illustration, when used as described in the patent, is adapted to produce such an atmosphere; viz., *freezing*, because exposed to the influence of the freezing mixture and protected by double non-conducting walls from the outer air; and *dry*, because there is no communication between it and the freezing mixture or the outer air.

The claim is in apt words to secure an invention such as has been described. It is—

"Preserving fish or other articles in a close chamber by means of a freezing mixture having no contact with the atmosphere of the preserving chamber, substantially as set forth" (Rec. p. 20).

The practical result accomplished by the invention thus patented is, that in a room or chamber suitable for storing fish, &c., in desired quantities, and from which they may be taken as desired, *the atmosphere is kept below the freezing point* and in a *dry* state (p. 1).

The close chamber, with the atmosphere of which the freezing mixture is not in contact, was an old means; the old ice-cream freezer embodied this.

The Piper patent is for the described mode of using such a close chamber, &c., for the purpose of preserving articles of food. It is for "preserving fish or other articles in a close chamber," &c., substantially as set forth.

There are two modes of using such a close chamber, &c., for such purposes. One is by contact with the cold walls, on the other side of which lies the freezing mixture. This can only be employed for *liquids*, which are capable of resting in such contact, and having the cold therefrom transmitted through the liquid mass. This was the

mode of preserving ice-cream in a frozen state; and beyond this the art never progressed until Piper's invention.

The other, and the new mode, described and patented by Piper, is clearly set forth in the body of his specification, and *excludes* the old mode. Piper's mode is to surround the articles to be preserved by producing and maintaining a dry and freezing *atmosphere* in the close chamber, and placing the article in this atmosphere, to be surrounded by it. This mode is applicable without limitation to all articles of food. It is absolutely new, and it is highly useful.

The patent cannot be construed as for the apparatus described. It is not a patent for a machine or a manufacture within the meaning of the act of 1870, § 24, allowing patents for an "art, machine, manufacture or composition of matter," but it is a patent for an improvement in the *art* of preserving fish and other substances from decay. The patentee calls it a method. It is really for a peculiar process. Neither term is used in the patent act, but either sufficiently indicates the nature of the invention, and each is synonymous with *art*, as that term is used in the act.

Corning *v.* Burden, 15 How. 252.
Curtis on Patents, §§ 9–18.
Tilghman *v.* Werk, 2 Fish. 518.
O'Reilly *v.* Morse, 15 How. 62.

It is plain that Piper's actual invention was of the process or method above described, of preserving fish, &c., by artificial congelation, which was capable of being carried out in various forms, and has, in fact, been so carried out by himself, always with very valuable results.

The court, having ascertained what the invention actually was, will give to the patent such a construction as will secure the whole of that invention, interpreting the language of the specification liberally for that purpose, if necessary.

Curtis on Patents, §§ 225, 231, 453, 456, and cases cited.

If the construction here put upon the patent is correct, the question of the novelty of Piper's invention is, not whether the appa-

ratus described in the patent was new, nor whether any apparatus was in existence before his invention which might have been so used as to practise the invention; but whether the patented process as described was in fact so practised.

And to overthrow his patent for want of novelty, it must be proved that before his invention fish or other articles had been frozen and preserved by a process in which the articles were frozen and preserved by immersion in the freezing atmosphere of a chamber, that atmosphere being reduced and kept below the freezing point by a refrigerating mixture which had substantially no communication with such atmosphere.

NOVELTY OF THE PATENTED INVENTION.

It is not disputed that the invention dates from the spring of 1858 (Rec. p. 19).

The appellees contend that the patented process was anticipated by, 1st, prior use of the common ice-cream freezer; 2d, prior use of certain refrigerating apparatus by William Davis.

I. The Ice-Cream Process.

This has been a matter of common knowledge since long before the date of Piper's invention; and it is extraordinary, if it is the same process as his, that the point never was suggested before. This patent was long before the Patent Office; it was for years bitterly contested in the Boston suit; and it has never before been supposed by anybody that it was to be destroyed by one of the commonest of household and public processes.

The common ice-cream process is familiar. It is described by appellees' witnesses, S. H. Davis, Dartois, Day and June (the witness Hewlett apparently had a process peculiar to himself), and is as follows: the cream is put into a metallic can, which is covered by an ordinary cap cover, and the can is placed in a tub larger than itself, the space between the two being filled in with ice and salt. The can is then rapidly rotated, first one way then the other, so as to bring all parts of the cream in it in contact with the cold metallic surface, and so freeze it. The rotating of the can is sometimes

omitted; but whenever this is done the same agitation of the cream, and consequent exposure to the metallic surface, is produced by "working" or "beating" it with a spaddle. The same result is obtained in substantially the same way, whether the can is rotated or the cream "worked" (Rec. Davis, Day, Dartois, June, Neereamer).

Hewlett does indeed say that he never practised nor heard of the agitation of the cream during the process (Rec. pp. 220–222).

It is not important, in the view here taken of the ice-cream process, whether this is so or not; but it is certainly extraordinary if Hewlett, who has made ice-cream for himself and others for years, never heard of what all the other witnesses describe as the ordinary and proper way of making it. His way, as the next witness says, "would not be proper for to make ice-cream." It is not "the right way" (Rec. p. 223).

The differences between Piper's process and the ice-cream process are apparent.

1. The ice-cream freezer is only designed to freeze *liquids*, as quickly as possible, by exposing all parts of the liquid to a cold metallic surface.

Piper's invention contemplates nothing of this kind. It is intended and expressed as meant to freeze solids. To freeze a liquid by his process would require a third vessel to hold the liquid exposed to the action of a freezing atmosphere.

2. In an ice-cream freezer agitation of the liquid to be frozen is necessary to accomplish the desired result.

No such movement of the thing to be frozen is necessary or practicable or of advantage in Piper's process.

3. In the process of freezing ice-cream, by whatever method, one essential element of Piper's process — the presence of a freezing atmosphere in the chamber, enveloping the article to be frozen — is wanting.

As far as this is concerned it is of no importance whatever whether the can is full, or half or quarter full, of cream. There is, of course, in each case a cold atmosphere *above* and *resting on the surface of the cream;* but there is no freezing atmosphere pervading

the chamber and enveloping the article to be kept. The cream in the one case takes the place of the atmosphere in the other.

This difference alone is, it is submitted, decisive.

As to the coating with ice spoken of in the appellant's patent,—

1. That coating with ice is no part of the invention. The patentee merely says, "The fish or meats *may, if desired*, be covered with a coating of ice by immersing them a few times in ice-cold water, or by applying the water with a brush or swab several times, forming a coat of about one eighth of an inch in thickness;" and that when this is done he applies to the fish, when they are to be kept an unusual length of time, a cover of cloth, &c. But he adds, "I do not desire to be understood as confining myself to the use of the specific apparatus above described, nor to the use of either or both the preliminary processes of freezing and coating; but I have described the mode of operation which by experience I have found best for preserving the most delicate varieties of fish."

2. That the freezing atmosphere in which the fish, &c., are kept is equally important, whether the fish are coated with ice or not.

There is no evidence that a common ice-cream freezer ever was, in fact, used in a way to anticipate the patent.

We do not suppose that the accidental freezing of half a chicken and some bread, by Mrs. Davidson in 1857, in the wilderness of Northern Wisconsin, will be seriously urged as a defence (Rec. p. 126).

That Hewlett froze a small fish in an ice-cream freezer as an experiment for this case, is immaterial. Doubtless the same could have been done in many an apparatus well known before Piper's invention.

II. Prior use by William Davis.

Most of the evidence in the case relates to alleged use of the appellant's process by William Davis, at various times, up to his death in 1868. Only the evidence relating to his alleged use before June 1858 need be discussed.

It mainly comes from his two sons, S. H. and D. W. Davis. The testimony of the other witnesses can be considered only as

evidence corroborative of theirs. These two were with their father, except for very short intervals, up to his death; were in business with him most of the time, and are familiar with all his proceedings. This defence rests upon their evidence.

Both of them are interested witnesses. Each owns a third of the Davis patent of 1868, by license under which the appellees are working in New York; and the remaining third belongs to their father's estate. They have assumed the defence of this suit.

S. H. Davis, Rec. p. 85.
D. W. Davis, Rec. p. 144.

Both testify, from recollection, to matters which occurred from fifteen to twenty years ago, and in a suit in which they have a great personal and pecuniary interest.

S. H. Davis gives the history of his father's proceedings much more fully than his brother. The silence of the latter upon many points is significant.

The Northwood Apparatus of William Davis.

The first apparatus that S. H. Davis ever knew of his father's using, was constructed and used at Northwood, a few miles from the city of Columbus, Ohio, in 1851 and 1852. At that time his apparatus was this:—

"He had several large ice-cream freezers. He put one of them into a flaring tub; then he put the flaring tub into a square box, and packed the space between the flaring tub and the box with either charcoal or sawdust, which was also packed underneath the flaring tub and the freezer that I have mentioned; the freezer was in the centre; the freezer formed the preserving chamber" in which were placed "meat, chicken, fish" (Rec. pp. 86, 92, 93).

Model Exhibit C represents the apparatus, except that there was a drain-pipe (p. 87).

His father had two or three apparatuses of this kind in use at that time, and used them daily (p. 87).

They were situated sometimes in the cellar of the house, sometimes one of them upstairs; and the use was open and public (p. 94).

They were used to freeze and preserve fish, meat and chickens, daily (p. 87).

D. W. Davis does not testify to the use of any apparatus at Northwood.

As to the use of this apparatus at Northwood, the essential testimony comes from Samuel Davis. The evidence of Neereamer and Fought, who also testify to a use at Northwood, will be examined separately.

Samuel Davis we expect to shew to be a witness whose evidence, not only on this but on all the points in the case, is not to be received.

On the 6th of January 1872 he swore to an affidavit in this cause, in which he described as the apparatus used at Northwood, *one entirely different from that which he now swears was actually used* there.

He then said, "In the year 1852 said William Davis had invented, and at that time was using, an air-tight box in which to place fish to be frozen, or other perishable articles to be preserved. *Within this box was placed an air-tight metallic pipe within which to place the ice and salt when it was desired to freeze the contents of the box, or ice alone when it was not desired to freeze, but simply to preserve, such contents. The box and pipe were so placed* in relation to each other that when in operation there was no communication between the *interior of the box and that of the pipe*, so that the articles in the box could not be brought into contact *with the ice in the pipe, or receive any moisture from the melting ice in the pipe*" (Rec. p. 93).

He now attempts to explain this by saying that it was a mistake of the person who drew the affidavit (who, as will be seen, is forced in this case to bear the burden of many remarkable mistakes of the same kind).

But it is incredible that Davis could have supposed, when he swore to that affidavit, that its plain and explicit language described the apparatus which he now says was used at Northwood in 1851 and 1852.

He either knew what he was swearing to, or he did not: if he did,

he swore to what he knew was false; if he did not, he shewed a recklessness which should destroy his credit as a witness.

When he made this explanation he had forgotten that he said, in the same affidavit, the "*refrigerating apparatus to which I have referred above* [being the one described in the quotation already made] was in use by said Davis at his place of business in Columbus, Ohio, and during and after the year 1856 at his place of business in Detroit, Michigan, and was daily opened in the presence of his customers for fish. *In addition to the device, which I have already described for the purpose of freezing fish, and which I identify as shewn in model marked Exhibit B*, said Davis employed *other devices*," &c.

He now says the device shewn by Exhibit B never was used at Columbus nor at Northwood.

The attempted explanation is preposterous in the face of the language of the affidavit itself, and it leaves the witness in worse condition than before he made it.

On direct examination he says that his father made this box; afterward, on cross, that he does not know who made it, nor where it came from.

He says in his direct examination that the apparatus, which he now says was used at Northwood, was there "used daily for freezing fish, meat and chickens" (Rec. p. 87). But on cross it appears that he does not know how often it was so used: "it was seldom; might have been every week, or might have been every two weeks" (p. 95).

It was only when they wanted to keep the articles for a few days that it was so used; and when it was, it was generally for meat and chickens (p. 95). But to keep these articles for a few days only, there was no necessity of freezing them at all. For that length of time it is better not to freeze, as that is always to some extent injurious to the flavour of the article. Davis had a refrigerator there (as will be shewn) which would keep the articles perfectly for this length of time without freezing. The only object was to keep the

articles "for family use, and for visitors who wanted them;" and "no great amount was kept in them" (p. 95).

Sometimes they used *ice and salt, and sometimes ice alone* (pp. 97, 98). Now fish and meat and chickens *cannot be frozen at all by the use of ice alone*, except by actual contact.

There was no moisture inside the can (p. 96). But fruit and vegetables in it "did not keep well, on account of the dampness; they would decay and mould" (p. 95). This is not only a contradiction, but an admission that Piper's process was not practised. There is no dampness or mould or decay in a dry and freezing atmosphere (p. 96).

The meat and poultry were sometimes frozen, sometimes not. He "can't recollect whether the fish were always frozen or not; they were frozen, though there might be some that were not." He cannot tell how many times fish were frozen, nor how many at a time (p. 97). The fish were placed in the bottom of the can, "*which was very small*," (pp. 95, 96).

This is all that he can say as to the actual use of these boxes.

Kept a milk-farm at Northwood, and had a large refrigerator there in the cellar, used to keep the milk in (pp. 93, 94). What the construction of this refrigerator was will appear presently. As it was used for milk, it evidently was not an arrangement for *freezing* anything (p. 96).

The witness does not know what became of these boxes. They were not taken to Columbus when Davis moved there in 1852 (pp. 94, 95).

And here it may be remarked, that every apparatus said to have been used by William Davis before Piper's invention either mysteriously disappeared or was destroyed; not one is now in existence.

S. H. Davis cannot remember the name of a single man employed at Northwood.

The appellant has been able to find three, Farr, Finger and Boyd, whose testimony will perhaps account for Davis' forgetfulness.

J. F. Neereamer is produced to support S. H. Davis.

He testifies that he was employed by William Davis, at North-

wood, at various times, as he was wanted, as confectioner to make ice-cream and cakes, during the summer of 1851. During that time William Davis frequently consulted with him, "in regard to freezing matters, as to the length of time, the quantity of ice and salt that it would require to freeze creams, with a view of applying it to meats. He had a large box made and placed in a separate apartment in the cellar of his house, separate from the cellar where I made the cream. He frequently used some worn-out ice-cream freezers, in which he packed spring chickens, packed in ice and salt; these were left, I can't tell you how long, in these freezers, but were removed to this box or chest, whichever it might have been, where they were kept for use as they might be required" (Rec. pp. 206, 207).

It will be noticed that Neercamer does not say whether or not there was any communication between the freezing mixture and the atmosphere of the chamber in which the things were placed *and frozen*. He does not know the process at all.

He knows nothing about the preserving of anything, except chickens (pp. 206, 208). All that he knows about that is, that Mrs. Davis once gave him *out of another box* a pair of chickens which were frozen (pp. 206, 207).

What the construction of this box was he knows nothing about (p. 207).

The only reason he has to suppose that this pair of chickens, taken out of a box of which he knows nothing, were frozen in an apparatus of which he pretends to know something, is, that "all the chickens that went into that chest went through *the same process*" (p. 208). But this process was *freezing* in the ice-cream freezers, and all he knows about this is, that he once was given a pair of chickens out of the *other box*, which were frozen.

This evidence comes to this: He says Davis used to freeze chickens in ice-cream freezers. He knows it only because he was once given a pair which had been *in another box ten days*, and these were frozen. He knows that these were frozen in ice-cream freezers because all chickens in that other box were so frozen. He knows that because he was once given a pair, and so on round again.

This other box, it will hereafter appear, was a large common re-

frigerator, used mainly to keep milk in. Of course there was no freezing temperature in that. How then could these chickens have been frozen?

First he says, Davis "frequently consulted with me in regard to freezing matters, as to the length of time, the quantity of ice and salt that it would require to freeze creams, &c." (p. 206). On cross-examination he says, "Mr. Davis was very particular about his secret, and did not consult me much about frigorific mixtures" (p. 208).

He says that William Davis' process of freezing and preserving chickens was *secret* (Rec. p. 208). Samuel Davis, it will be remembered, says it was open and public (p. 96).

Which tells the truth, or does neither; and was there no such process practised there at all? We submit that the proof is conclusive that there was not.

John Boyd was employed by William Davis, at Northwood, from August 1850 till September 1852, as a man-of-all-work, and was there when Davis left it (Rec. pp. 60, 61).

The second summer Boyd "was about the house mostly," and used to freeze ice-cream in the cellar (Rec. pp. 60, 62).

Except the common ice-cream freezers used for cream alone, and a large ordinary refrigerator in the cellar, used for milk principally, there was no refrigerating apparatus at Northwood at all while Boyd was there, and no artificially frozen fish or meat or poultry (pp. 60, 61, 62).

He describes this large refrigerator as "made of boards — common boards. The lid of the box was raised by a pulley and weight, so that it would remain up when raised. The box was made of two thicknesses of boards. They told me there was charcoal between the boards, to keep the milk cool. There was a partition at one end, in which we could put a bushel or two of ice. There was no salt used. I put pieces of ice around the pans to keep the milk cool." "The part partitioned off in which the ice was put had a separate lid to it" (pp. 60, 61).

The box was left there when Davis moved to Columbus (pp. 61, 62).

Nothing ever was, or could be, frozen in this box, except by actual contact with the ice. Samuel Davis does not pretend to say that there ever was. Indeed, he is careful to say as little as possible about this refrigerator.

This is the box that Neereamer's chickens were taken out of after they had been in there ten days. Plainly they were not preserved by Piper's process.

Joseph Finger was in William Davis' employ from the spring of 1851 for pretty nearly two years. He never saw any apparatus there, except a large refrigerator for keeping milk, in using which the ice was put into the bottom of the box, and the milk on the shelves in the same compartment (Rec. pp. 75, 76).

James Farr worked for William Davis, at Northwood, "from about the middle of June 1852 till he moved to Columbus on the 1st of September thereafter," and then worked for him in Columbus till October 22 1853 (Rec. pp. 73, 74). He says, "I did not see anything, except an ice-box used for keeping the milk in, and an ice-cream freezer; I did not see anything used for freezing meats or artificial substances" (an evident misplacing of words). And he never saw there any apparatus, except an ice-cream freezer, used for freezing anything (Rec. p. 74), nor any frozen meat or fish or chickens (pp. 74, 75).

There was, however, in the cellar at Northwood a large refrigerator used for keeping meat, &c., but chiefly milk, in which ice was put in the bottom of the same compartment in which the other things were kept (p. 74). But Davis' business was keeping a dairy, and "he kept chiefly milk in the box" (p. 74).

Simeon Fought, for the appellees, testifies to seeing some sort of a refrigerating apparatus at Northwood once while Davis was there (Rec. pp. 211–214).

He only saw it once, knows nothing about its construction, and "cannot describe it," not *even where the ice was in it.* He thinks there were some fish in it. He thinks some chickens were in it, and that they were frozen, because they looked like some chickens which he saw upstairs, which he says were frozen.

It is plain, from his description of it, that the apparatus which he saw was the large milk refrigerator which was there in the cellar.

This witness also swore to an affidavit in this cause, in which he gave a description of the apparatus used at Northwood by Davis, as he saw it; and said, "I was acquainted with William Davis during his residence in the city of Columbus; was a visitor at said Davis' when said Davis owned and resided at Northwood in 1852; *I have frequently seen*, at said Davis' residence (Northwood), refrigerators for the preservation of fish, meats, poultry, &c. "Have seen said Davis take from these refrigerators fish, poultry, &c., in a frozen state; and they were constructed in two separate apartments; to wit, one apartment to contain the articles to be preserved or frozen, and the other apartment the refrigerants. Said Davis was using this process publicly" (Rec. p. 211).

It now appears that this affidavit was not true. Fought's explanation is given on page 211.

This is the evidence in regard to the Northwood use. We submit not only that the appellees failed to prove it, but that the result of their attempt is to discredit the whole Davis defence. The evidence to shew either the existence or the use of apparatuses there, involving the practice of the appellant's invention, is weak and untrustworthy in itself, and completely answered by the testimony for the appellant.

Use at Columbus.

The Davis brothers testify to a use by William Davis, at Columbus, in 1854 and 1855, of an apparatus said to be the same as the appellant's; and other witnesses swear to the sale of frozen fish by Davis at that time.

The mere fact of such sale, if proved, would be of no avail, except as tending to shew the truth of the Davis account of how the fish were frozen. So, as through the case, the essential evidence of this alleged prior use comes from them.

William Davis moved from Northwood to Columbus in September 1852.

The apparatus said to have involved Piper's invention was not used till the summer of 1854.

S. H. Davis, Rec. pp. 89, 97, 99.
D. W. Davis, Rec. pp. 142, 143, 148, 150.

But Davis kept a hotel there, and was in the fish business meantime; so he had even a greater occasion for freezing and preserving there than at Northwood. Why he did not, if he had done it successfully at Northwood, as is claimed, is not explained (S. H. Davis, pp. 87, 143).

The apparatus said to have been used at Columbus was this, —

"It was one box packed inside of another, and the space between the two was packed with sawdust. There was a partition off of one end of the inside box about six or eight inches; the partition consisted of tin. Then there was a lid on both boxes, a lid on the box for the preserving chamber, and one on the chamber where the freezing mixture was of ice and salt." There was no atmospheric communication, and the method of freezing was to put the fish into the preserving chamber on shelves, so that the fish would not be more than from four to six inches deep. The space partitioned off was filled up with ice and salt. Exhibit A is a model of *the inside box*.

S. H. Davis, Rec. p. 89.
D. W. Davis, Rec. p. 142.

Two of these boxes were used at Columbus by William Davis at the same time; each was from four to five feet long and about three feet in width and depth.

S. H. Davis, Rec. pp. 97, 98.
D. W. Davis, Rec. pp. 142, 143.

It will be remembered that in his affidavit of November 6 1871, S. H. Davis describes the apparatus used at Columbus, and identifies the model Exhibit B as a representation of it. This is entirely different from the one which he *now* says was used there.

D. W. Davis, in his affidavit heretofore given, describes the same apparatus as his brother, and says that it was continuously used by his father from 1854 to 1868 (Rec. p. 150). The rest of the case will show how far this statement was true.

He said, moreover, that up to 1867 his father was "engaged in *experimenting with various forms and constructions of proper refrigerating apparatus for the purpose of his business.*"

The contradiction between what these men once swore to and what they now say, is destructive to both of their statements.

In Columbus there were three market days each week, and this apparatus was used to keep fish from one market day to another; *i.e.*, thirty-six hours.

S. H. Davis, Rec. p. 87.
D. W. Davis, Rec. p. 142.

So there was no need to freeze the fish to accomplish what was wanted. It is never desirable to freeze when it can be avoided.

Ice and salt were used as a freezing mixture, and nothing else. (S. H. Davis, p. 98.)

But the fish were sometimes frozen and sometimes not.

S. H. Davis, p. 98.
D. W. Davis, pp. 143, 148.

Why not always frozen? The supposed answer is, that sometimes the apparatus was used to freeze, and sometimes to preserve without freezing. But the object being to keep them only from one market day to another, why the difference, especially when there was no need to freeze at all?

The fish were not always frozen, only "when they were in there long enough." (D. W. Davis, p. 143.) But they were never there long enough to make it desirable to freeze them.

Fruit and vegetables could not be kept in boxes like these said to have been used afterwards; "they would *freeze next the tin*, and spoil away from it on the opposite side." (S. H. Davis, p. 91.) And fish must have done the same.

The fish were "generally frozen in the end where the ice and salt was, and in the other end when they stayed in there long enough, which they sometimes did." (S. H. Davis, Rec. p. 98.) They never did. The evidence is clear as to this, as shewn above.

S. H. Davis says he knows that a fish in the end of the chamber furthest from the ice and salt was once frozen in about two hours (p. 99). And D. W. Davis states that he has known a hundred or

a hundred and fifty pounds of fish to *be frozen equally all over the chamber*, though how long it took he does not know (pp. 148, 149).

But both of these things are impossible. It took between *twenty-four and thirty-six hours* to freeze a small fish in *Hewlett's ice-cream freezer* (Hewlett, Rec. pp. 220–222). And Mitchell could not freeze in three days in the Adrian apparatus, which was exactly like this (pp. 163, 171, ints. 30, 144).

These boxes were kept in the back part of S. H. Davis' fruit, peanut and candy store.

S. H. Davis, pp. 97, 98.
D. W. Davis, pp. 142, 149.

Where they came from, or what became of them, is not known. It will be seen hereafter that when Davis next had an apparatus, it was entirely different from this (pp. 98, 99, 100).

Simeon Fought, before mentioned, says that he bought fish of William Davis "some time between 1853 and 1855 which he knows were artificially frozen" (p. 209).

How they were frozen he does not know. "I didn't see them frozen; I only know that they had been frozen. I think that is all I know about it" (p. 212).

He has bought frozen fish of others than Davis there, but whether as long as ten or fifteen years ago it is impossible for him to say (p. 213). And whether he bought them of other parties than Davis while Davis was there he does not know (p. 212).

Nobody in the country had them at that time, unless Davis did. The thing was unheard of, and "a great curiosity" long after.

Fought's value as a witness has been already considered.

Jacob S. Ritze is produced to prove the sale of frozen fish by Davis. He bought fish of William Davis while he was in Columbus. His answers are so peculiar as to excuse liberal quotation.

He is asked on direct whether he noticed anything peculiar about these fish or any of them; and he says, "I don't know as I could see anything peculiar about them; some days it was pretty hot, and the fish wouldn't keep so long" (pp. 213, 214).

This question failing, he is asked whether any of them "were

frozen or not." His answer is "Not at one time; sometimes they were frozen, and sometimes they were not" (p. 214).

Then this question is put: "How often were the fish, thus bought, frozen; quite often or rarely?" *Ans.* "That's so long ago, I don't know as I can remember how often. Sometimes I was there when the fish came, and sometimes I was not; can't remember how often."

He is then asked whether he bought frozen fish a hundred times, or no more than five. And he says, "I can't tell that; it would be impossible; it was certainly more than five times. In hot weather of course they would be frozen; in moderate weather they would not be."

On cross-examination he says that he always bought frozen fish in hot weather *when he could get them.* When asked whether frozen fish were not uncommon there in hot weather, he says, "We got them when we could. I can't answer any further than that sometimes they couldn't get frozen fish themselves. . . . I mean Davis first, and then David Joyce, and there were others that shipped fish through here to railroad; and I bought a great many fish out of the river, sometimes of Charles Wagner" (p. 214).

Nobody's else fish "came frozen just like Davis'; I never saw any that way before." When he is asked how these other fish, not Davis', came frozen, he says, *I don't know as they were frozen at all.* They came packed in barrels and boxes with ice" (p. 215).

But Davis' fish came in barrels or boxes with ice, too (pp. 215, 216, ints. re-direct 3; re-cross 1, 2; re-direct 1, 2).

He has seen the Davis fish frozen so hard sometimes that they had to be broken apart; but whether it was in hot or cold weather he "can't say. He don't remember, and can't answer anything further" (p. 215, int. 4).

Now, when it is remembered that at that time there had never been an artifically frozen fish in existence, unless Davis had them, this testimony is remarkable.

Peter Ambos, in whose restaurant Ritze was enployed, and for whom these frozen fish were bought, if at all, never saw or heard of such a thing at that time (Rec. pp. 77, 78).

Neereamer, already considered as to the Northwood use, knows that Davis had frozen fish for sale in Columbus, on High street (the same store spoken of before) Rec. p. 207.

The fish were frozen by putting them into tin cans, burying the cans in salt and ice, held in a tub, and then covering the whole over with cloths or a cover (Rec. p. 207).

This is remarkable. If true, how does it happen that neither of the Davis brothers knows or says anything about it?

Hiram Simonton was a hotel keeper in Columbus while Davis lived there, and bought fish of him; and he never saw or heard of artificially frozen fish till long afterward (Rec. pp. 76–78).

Charles A. Wagner knew William Davis all the time he lived in Columbus; was in the fish business himself at the same time and in the same market, and he never saw or heard of artificially frozen fish there till many years after (Rec. p. 73).

W. W. Riley says that he saw in Davis' store in Columbus, a box which he did not examine, but which he thinks was the same as one he had previously seen used by Davis in 1850. His testimony, as to this use in 1850, will be examined hereafter (Rec. pp. 217, 219).

There is no other evidence in regard to the Columbus use.

It will be noticed that all the evidence as to the construction and actual use of the apparatus comes from two witnesses, both interested in the success of this defence, testifying to the details of an apparatus which disappeared seventeen years ago, one of them throughout the case wholly discredited, the other deeply concerned to sustain him.

At the most, giving the evidence all the weight and credit that can be claimed for it, nothing more is proved at Columbus than an unsuccessful, abandoned experiment, by means of an apparatus which never was practically used so as to anticipate the appellant's process.

Clear, positive and trustworthy evidence is demanded of those upon whom the burden lies, not only that the apparatus was there, but that the patented process was practised with it. This, we sub-

mit, the appellees have not furnished, either as to this or any alleged prior use.

Wing *v.* Richardson, 2 Clifford, 449.
Johnson *v.* Root, 2 Clifford, 168.

Riley also testifies to the use of an apparatus by William Davis, in Columbus, from January 1850 to July 1851. His testimony as to this can most conveniently be examined here.

This apparatus, according to him, consisted of a box about three and a half or four feet long, thirty inches high, and about the same in width. Inside of this was put a smaller box, leaving a space between the two, which was filled with charcoal. Inside of this inner box was another to hold the refrigerating material. This inmost box had a separate lid to close it up tight. The box which held the fish had also a separate cover, and there was another cover for the whole (Rec. p. 216, int. 8).

All the testimony in regard to this apparatus and its use comes from Riley. S. H. Davis, who, according to Riley (p. 218), helped his father run it, and D. W. Davis, who lived with him, know nothing about it.

The apparatus described is the most elaborate one ever said to have been made by Davis until 1864, and the appellees would have it believed in constant use and successful; yet it immediately disappeared. And the next year, at Northwood, Davis is said to have been inquiring of Neereamer about the first principles of freezing, and using the clumsy ice-cream freezer apparatus already considered.

Riley's evidence was not given till some time after the rest of the testimony about the Northwood and Columbus use had been taken and replied to by the appellant.

He says that he had occasion to see the box in use almost every day while he boarded with Davis (p. 216, ints. 6, 13); but as to the details of its construction he really knows little (p. 216, int. 8).

The value of his recollection appears from the fact that he thinks it was "identically the same box" as that testified to as used in Columbus in 1854 (pp. 216, 219, int. 23; cross 17). This cannot be if the Davises are to be believed. The apparatus is not the one described by them.

Neereamer's statement of what Davis used at Columbus still further complicates the inconsistency.

Whatever it was, if ever used at all, its operation must have been experimental and unsatisfactory, or Davis would not have come back to the ice-cream freezers immediately afterward.

Riley's testimony leaves it more than doubtful whether any fish were ever frozen in the box he describes.

He says that Davis "attended market three times a week, *and got his fish the day before and put them in this box, and took them out and sold them the next day*" (p. 216, int. 13). "Occasionally he would not sell all out, and the next market day they appeared just as good as ever, and sold just the same" (p. 217, int. 14).

He is then asked how the fish looked and felt when they had been in this box; and he says, "They looked just as well as ever, for all I could see, and *felt solid and firm;* that was the great object, to have them look well"(p. 217, int. 15). But he never felt of them at all (p. 217, int. 17). To the direct question whether they were frozen or not he says he thinks they were frozen (p. 217, ints. 17, 27).

On cross-examination the question is repeated twice. The first time he answers as before, that he thinks they were frozen; the second time he says, "*I suppose there are degrees of freezing; they were frozen sufficiently to keep them from one market day to another, and that is all I know about it*" (p. 218, cross-ints. 5, 6).

The fish always came out of the box in the same condition (p. 218, cross-int. 8).

They used to come to Davis packed in ice, and Riley thinks "he used to clean them off, and they would come out nice and clean in the morning" (p. 218, cross-int. 9).

For a freezing mixture in the apparatus Davis used "pulverized ice and salt — perhaps; he, I think, might have had other things, for all I know" (p. 218, cross-int. 10).

In a box with a much larger receptacle for freezing mixture in proportion to the size of the preserving chamber, said to have been used long after at Detroit, S. H. Davis says that fruit and vegetables could not be preserved; there was decay and mould. This makes it certain that there was no freezing atmosphere.

Riley says that Davis claimed in 1850 to have got up a circulation

of air. It will be seen, further on, what other witnesses, the Davis brothers and Sprague (who claims to know all about Davis' operations and got his patent for him), say about this. It is important here mainly as shewing that for some reason or other Davis had not at this time a freezing atmosphere. Circulation is only desirable when the temperature is above freezing.

There is no other evidence as to the alleged Columbus use.

We submit that the appellees have failed to sustain the burden resting upon them, and that there is no sufficient evidence of prior use there of the patented invention.

Use by Davis at Detroit.

In 1855 Davis moved from Columbus to Sandusky, where he lived about a year, keeping a hotel and dealing in fish.

S. H. Davis, Rec. pp. 89, 100.
D. W. Davis, Rec. pp. 142, 150, 151.

He had no apparatus there (S. H. Davis, Rec. p. 89). Though he had then the same occasion to use the process there as at Northwood or Columbus, and he had been perfectly successful at both these places and was perfectly successful with another apparatus, the appellees say in less than a month after he went from Sandusky to Detroit.

He moved to Detroit in November 1856.

S. H. Davis, Rec. p. 100.
D. W. Davis, Rec. p. 142.

The first use alleged there is testified to by Thomas S. Sprague, Davis' attorney and patent agent.

The apparatus is described as entirely different from any other said to have been used by Davis.

Sprague testifies to buying frozen fish of Davis in the late summer of 1856, and examining the apparatus in which they were frozen. His account of the circumstances and description of the apparatus are on pages 157–158 of appellees' Record.

Without quotation from his testimony, we remark upon it, —

1. That he describes an apparatus which never existed at all. It is not like any other said to have been used by Davis.

2. In 1856, as above shewn, Davis was living in Sandusky, and had no apparatus anywhere.

3. The only apparatus (Exhibit B) which in any respects resembles it, was not built till December 1856, and was never on the docks at all. The box like Exhibit D is the only one claimed to have been used there (Rec. p. 90.)

4. S. H. Davis, who may be supposed to know, says his father *never had any apparatus of any kind on the docks till* 1857 (Rec. p. 90).

5. Sprague says he saw it on the De Garmo Jones dock in 1856. Davis was not there till 1859 (S. H. Davis, pp. 107, 108).

6. The box which was used on the De Garmo Jones dock was entirely different from the one Sprague says he saw there. It was like Exhibit D (S. H. Davis, pp. 45, 46, 90, 91, 101, 102).

So that if Sprague ever saw any apparatus at all he saw *an entirely different one from what he says he did, and he saw it in* 1859.

But his evidence is important as shewing how Davis had been attempting to preserve fish *up to* 1859.

In Sprague's affidavit (p. 160) he says, "The said Davis explained to me how he froze the fish so as to prevent them from being salted in the operation; he (the said Davis) told me that he placed the ice and salt in a metallic receptacle, which was air-tight when closed, which was placed in a box when filled with ice and salt, and closed; *the fish were then placed in the box and against the outside of the metallic ice-receptacle, and the box closed;* when the fish had been in there a sufficient time, they were frozen stiff"(p. 160).

This effectually disposes of the alleged prior use at Northwood, Columbus and Detroit. Up to that time William Davis had never practised the Piper process; he had never obtained a freezing atmosphere in which to keep the fish in the preserving chamber.

But more than that, this affidavit contradicts the testimony both of Samuel and David Davis. For in this way only a very few fish could have been frozen at a time (and they, without turning over, only on one side), so that their testimony in regard to the number of fish, &c., frozen in the Columbus apparatus, cannot be true.

Sprague knows more about William Davis' freezing operations than anyone, except Mrs. Davis, now living; he was his friend and solicitor. Either his testimony or that of the Davises is untrue.

Sprague is also put forward to explain Davis' behaviour about his invention, which needs explanation, if what is claimed for him is true. He had made a valuable invention, and knew that he had, for he "had preserving fish on the brain" in 1850–51, Riley says; and yet for seventeen years he never claimed it, never patented it (obstinately refused to do so), did nothing with it that a man who had accomplished such a result would naturally do.

The explanation is, that his object was to produce an internal circulation of air in the box, and this was not accomplished till 1868 (Sprague, p. 159).

The answer to Sprague's explanation is Sprague's and Davis' act. Sprague took out Davis' patent for him, dated June 16 1868, and *there is not a word in that patent about circulation of air; but an apparatus is described and patented which absolutely excludes the possibility of a circulation.*

Riley says that Davis claimed to have got a circulation as early as 1850.

Davis is said to have tried still another kind of apparatus at his house on various streets in Detroit, with a single tube running down through the centre of the chamber, to hold the freezing mixture, closed by a plug, so that there was no communication between the mixture and the chamber.

Samuel Davis was with his father all the time, and gives the account of this apparatus and its use.

According to him it was used for about *three months* in the fall and winter of 1856–7 at Adams and Jefferson avenues (Rec. pp. 89, 100). Then during the summer of 1857 on Congress street (p. 100).

In the fall of 1857 or spring of 1858 Samuel Davis himself tore it to pieces (p. 100).

D. W. Davis testifies to its use on Adams and Jefferson avenues only (p. 147).

But he lived with his father all the time. If it was used anywhere else he certainly knew it (p. 145).

He says it was used continuously for *five or six months* on Adams and Jefferson avenues openly and publicly (p. 145).

The fish frozen in it were sold around to the hotels and on the street.

S. H. Davis, pp. 18, 44, 89, 100.
D. W. Davis, pp. 147, 148.

It was a box five feet high and four feet square, with a tube ten inches in diameter running down through the centre of the chamber and through the ceiling.

S. H. Davis, pp. 17, 89.
D. W. Davis, pp. 143, 144.
Barlin, p. 133.

Only *fish close to the tube* could be frozen in it.

S. H. Davis, p. 89.
Wildes, pp. 109, 110.

And so only a few could be frozen at a time. Samuel Davis says a hundred pounds. Another witness, who claims to have tended it, says only twenty-five or thirty pounds.

S. H. Davis, p. 89.
Wildes, pp. 109, 110.

Here Davis' description to Sprague of his mode of freezing is confirmed.

The existence and use of this apparatus are testified to by other witnesses.

John Wildes swears that he was employed by William Davis at his house on Congress street in 1857; that this box like Exhibit B was then there, and he was employed to help run and tend it.

We submit that he is an untrustworthy witness.

He says that this was in 1857.

He has worked for Davis at various times from 1856 to 1870. William Davis died in 1868.

He knows it was in 1857, because it was the last year that he sailed in the steamboat "United" with Capt. Buzzard, and he sailed with Buzzard two years, beginning *in* 1853 *and leaving off in* 1855 (pp. 110, 111).

After he left the "United" he worked on a farm for *one year;* then was idle for *three months;* then worked on a scow for *one month; then* went to work for Davis (p. 110).

Now the fact is that Buzzard was not captain of the "United" till August 1855, and he sailed her till August 1858 (Dodsley, Rec. p. 87).

Taking Wildes' own account of himself, this would bring the date of his going to work for Davis late in 1858; but he says he did not work for him in 1858 at all, but *did in* 1859. This is probably true, and this was the first time.

At first he says he worked for Davis three months, beginning in August and ending in November (p. 110). Then he says he left off in December; and still again says he began in October (p. 112).

Certainly there is no evidence here that Davis had this apparatus in 1857 or 1858.

But the witness shews his character in other matters. It is admitted that only a few fish could be frozen at a time in this box. (S. H. Davis, Rec. p. 89.) Wildes says that only twenty-five or thirty pounds could be frozen at a time, but says that the reason Davis did not freeze more at a time was "because he didn't want to." But in the next breath he says he has seen five hundred pounds in the box at one time, which had been frozen in successive lots of twenty-five or thirty pounds each (pp. 111, 112).

The fact that only a small amount of fish could be frozen at a time in this apparatus, and the reason of it, are of importance, because they shew clearly that even up to this time Davis had never succeeded in doing what Piper accomplished in 1858; viz., producing a freezing atmosphere in the preserving chamber. In fact, Davis never did accomplish this fully until 1864, when he built an apparatus with four tubes in the chamber.

S. H. Davis, p. 106.
D. W. Davis, p. 146.

And this is further important as relating to the statements of the Davises, that fish after being frozen in this apparatus were kept piled up all over the floor for months. If there was no freezing atmosphere the fish would no more stay frozen than they would freeze; and thawing fish cannot be kept for months.

Albert Harryman testifies that late in 1856, in November or December, William Davis gave him two frozen fish out of a box at his house on Adams avenue. He did not examine the box, and knows nothing about its construction (Rec. pp. 127, 128).

The value of his recollection, and his accuracy as a witness, will be better shewn when we come to examine his testimony about another apparatus which Davis is said to have used.

Amelia Rayle, daughter of William Davis, testifies that she saw frozen fish at her father's house on Jefferson avenue in the spring of 1857. They were then "a great curiosity" (evidently not so common in that family as her brothers would have us believe they had been for seven years). She saw them taken out of a box then, but knows nothing at all about the box.

She says they were frozen hard, but she cannot remember whether she ever touched them or ever examined them. She cannot remember how many she saw or how many times she ever saw them there. Her father used to have a good many fish about the house.

There is nothing particular to make her think that it was at Jefferson avenue, or before May 1857, except that they had a barn there; but they had a barn at other places in Detroit. And she cannot recollect where the freezing apparatus stood on Jefferson avenue (Rec. pp. 122, 124).

The testimony of *Emma Worman*, another daughter of William Davis, is on pages 124, 125 of appellees' Record, and requires no comment.

Samuel Barlin says that he worked for William Davis, with short interruptions, from the spring of 1857 till Davis died in 1868, and tended a freezing apparatus during all that time like Exhibit B (the tube apparatus).

We submit that this witness is not to be believed.

He says that Davis had this apparatus at every place he lived in at Detroit, after that time, and used it continuously at all of them from 1856 to 1868, except at Madison avenue, where he had it, but did not use it; and that he (Barlin) himself tended it all this time (Rec. pp. 134, 135). And never any other kind (p. 135).

But this cannot be true, if the Davises are to be believed. Samuel Davis says *he himself destroyed this apparatus in* 1858 (S. H. Davis, Rec. pp. 100, 101), *and they did not have another one like it till* 1864. *From* 1862 *to* 1864 *they had none at all* (pp. 100, 101). And after this was destroyed *they never had another one at any of the places named by Barlin.* The only box they pretend to have had between 1858 and 1864 was on the docks in Detroit (p. 101).

Such extraordinary conflict of witnesses cannot be explained. It is ruinous to the witnesses involved, and discredits the whole defence.

But the appellant insists that Barlin never was in Detroit at all till years after the time he says he went to work for Davis.

Much testimony has been taken on this point, but it is easily summarised.

Barlin says that he came to Detroit with his mother, Maria Barlin, in the fall of 1856 (Rec. p. 132).

He says he knows it was in 1856 because he first lived with his mother on Lafayette street, and his mother had a receipt for her rent (cross, p. 133). But this receipt he cannot produce. It is lost; he has not seen it for ten years or more (cross, p. 135).

The landlord's first name was Francis. He is now dead. Barlin forgets the last name (p. 133). The appellant has been able to supply the defect. The landlord's name was Francis Schulte. The result of the discovery of it will perhaps account for Barlin's failure of memory.

Francis Schulte at that time owned three houses on Lafayette street; one in which he lived himself with his family, one next door which was rented, and one directly opposite, which was also let.

August Schulte, Rec. pp. 42, 43, 53.

Elizabeth Schulte, Rec. pp. 53–55.

Stephen S. Johnson met Mrs. Barlin and her family on the dock on their arrival in Detroit. Her things were still on the boat. She wanted to get a house to live in, and she asked Johnson if he knew of one. He directed her to Schulte's house, directly opposite where Johnson himself lived. She moved in there immediately and lived there several years, and then moved into Schulte's other house across the street (Rec. pp. 64, 65, ints. 1–8). He cannot fix positively the date, but is certain that it was after the war began (p. 66). The date is not important, as far as this witness is concerned. That is fixed by other evidence.

Martha J. Johnson, wife of the last witness, is acquainted with the Barlins. When they first came to Detroit they lived in Schulte's house directly opposite that of the witness, on Lafayette street. Mrs. Barlin had just come to Detroit and wanted to get a house; the witness shewed her Schulte's and she moved in immediately. This was after the war began; she thinks in 1860 (Rec. p. 46).

Anna Thomas lived in Schulte's house on Lafayette street one month, from September to October 1859. Mrs. Barlin and family were not living there then. She moved back there in 1862 and found the Barlins living there (Rec. p. 56).

Romulus Morton lived in Schulte's house from October 1859 to May 1860. The Barlins did not live there during that time. There were three tenements in the house. Mrs. Randall lived in one, Mrs. Needham in the other. Mrs. Randall moved out in March 1860 (Rec. p. 57).

Mary Randall lived in Schulte's house while Morton did; moved from there, and was gone a year; then moved back again. The Barlin family moved into the house after the witness went there the second time (Rec. pp. 57, 58).

Amanda Needham lived in Schulte's house in August 1859. The Barlins were not there then (p. 55).

Elizabeth Schulte is the daughter of Francis Schulte, now dead, and attended to his business. Mrs. Barlin and family (a son Sam and a daughter Adeline) moved into Schulte's house on Lafayette street, next door to where witness lived, in 1860 or 1861. Afterward she moved into another of Schulte's houses opposite, and remained

there till 1867, when a new house was built there (Rec. pp. 53, 54, 55, direct ints. 1–13, 18; cross 7–12, 16).

She is well acquainted with Mrs. Barlin. Mrs. Barlin has often told witness that her father was the first man she rented of in Detroit (p. 54, ints. 16, 17), and that she lived in both of his houses seven years (int. 19).

August Schulte, son of Francis Schulte, knows the Barlins; they lived in two of his father's houses between six and seven years, and moved out in 1867, when the house was torn down (Rec. p. 43, ints. 3–7).

David C. Dibble, a visitor at Davis' house in 1859 and 1863, and afterward a workman for him, first saw Barlin there in 1867 (pp. 51, 52, ints. 3, 21–26).

We submit that, unless overthrown, this evidence is fatal to Barlin's testimony.

An attempt is made to reply to it, but Barlin is not recalled, nor Mrs. Barlin called to contradict or explain it.

The testimony which is offered in reply deserves examination.

S. H. Davis swears that Barlin worked for William Davis *in* 1857 *on Jefferson avenue*. He says nothing about any other time or place (Rec. p. 179).

Mrs. Worman swears that she first knew Barlin on Jefferson avenue in 1857, "as near as she can recollect. He was then working for her father" (p. 180). She "can't remember when he didn't work for them up to three years ago." But she cannot remember either when he did, nor how long (p. 180, ints. 2–4).

Mrs. Rayl is led to testify that he worked for her father, off and on, from 1857 to three years ago (p. 181).

D. W. Davis and Mrs. Davis are silent.

George W. Hector says that he was well acquainted with Barlin as early as the fall of 1856 (Rec. pp. 177, 178, 179, ints. 2–10; cross 14, 23–34).

He knows it was in 1856, because he was working for Charles Shippey in a livery stable, and Barlin was there frequently to see him, &c. He has political reasons for his certainty (p. 177, ints. 2–10).

But Shippey is found, and it appears that he *never kept that stable till June* 1860, and that *Hector worked for him from the following winter till some time in the summer of* 1861, *and never at any other time.*

Rec. pp. 58, 59.
See also evidence of Parsons, p. 60.

George de Baptist swears that he first got acquainted with Samuel Barlin in 1857, "as near as he recollects."

But on cross he says that this was while he lived on Larned street, and he moved to Larned street in *May or June* 1865 (Rec. pp. 186, 187).

Wm. R. Hines became acquainted with Samuel Barlin in 1857 or 1858; *he thinks in* 1858. He was then in business with John Morse on Michigan Grand avenue, near Randolph street, now occupied by Fischback, Jeremiah Calnon, landlord. He saw Barlin several times then, probably about twice a week, for a month or two, sometimes once a week. Afterward he says for six months (Rec. pp. 181, 182, cross 25–27).

He knows it was Barlin, because he asked him his name. Barlin was then a boy, but Hines remembers him so well that, though he had never heard his name mentioned meantime, he picked him out of a group at once, *when Samuel Davis took him to where Barlin was* (pp. 182, 183, cross 12–17).

But *Jeremiah Calnon* testifies that he built and has owned that building since 1857; that no man named John Morse ever occupied it; that Thomas G. Morse did, first with a man named Dailey, then alone (under the Dailey lease, he believes); that Morse left in November 1857; that he knows Hines, and Hines was not there, to his knowledge. He has a record of all his rent business, kept by himself (Rec. pp. 70, 71).

James F. Mitchell says that he knew Barlin in December 1857. He fixes the time as when he was then living in Mrs. Wallace's house on Fort street. And it was about the time he worked at the Biddle house (Rec. p. 187, ints. 5–7).

But it appears that he has lived in that house twice. When he was there the second time he has no idea (pp. 187, 191, ints. 9, 10; cross 57–61). And he has worked twice at the Biddle house; once

in the winter of 1857–8; as to the second time, he can do nothing more than guess it was 1859, as near as he can remember (p. 190, int. 48).

He says that he knew Barlin when he first lived in Wallace's house; but he has no reason for thinking so. All he knows is, that it was sometime while he lived there, and about the time he worked at the Biddle house.

William P. Smith is also brought to prove that Barlin was in Detroit when he says he was.

The value of Smith's testimony depends entirely upon his accuracy and means of recollection as to the date. He says that he first knew Barlin in 1855 (Rec. p. 183, int. 3). He judges that it was about 1855, because he knows just where he was working (for Sutherland & Foote), and when he was married (p. 184, cross-int. 11). Barlin says that he was not in Detroit till October 1856 (p. 132).

Smith was married in 1861 (p. 185, ints. re-direct 1, re-cross 1).

He began to work for Sutherland & Foote in 1856 *or* 1857, *and worked there four years* (p. 184, ints. 12, 13). Afterward he says it was two years *before* he began to work for Sutherland & Foote that he first knew Barlin (pp. 184, 185, ints. re-direct 2, re-cross 3).

Still again, after he left Sutherland & Foote (*i.e.*, after 1860 or 1861) he huckstered for several seasons, and then "went to whitewashing" (p. 185, int. 20). It was while he was whitewashing that he got acquainted with Barlin (p. 185, re-direct 3).

He knows that at one time Barlin lived on Lafayette street. At first he says it was in 1860; afterward he cannot say what year it was, only that it was between 1860 and 1870, and since he has lived in Windsor, where he has been seven years (pp. 184, 185, cross-ints. 2, 18).

He saw Barlin "several times around the market" (p. 185, ints. 4, 5).

This is the attempt to answer the appellant's evidence that Barlin did not come to Detroit till years after he says he was employed there by William Davis.

It will be noticed that Barlin himself is not recalled. Mrs. Barlin

is not called; neither Mrs. Davis nor David Davis, who must know whether he was in their employ, is produced. The testimony of Samuel Davis (an already discredited witness) and that of his sisters is more than unsatisfactory. Every disinterested witness is overthrown.

We submit that Barlin's testimony is not only worthless as evidence, but fatal to the Davis defence. For as to this, as in regard to his testimony about tending the apparatus for ten years after it was destroyed, there is no possibility of an honest mistake.

George H. Harrington testifies that he saw a box with a tube in it at Davis' house on Jefferson avenue in 1857.

He saw it only once to have his attention called to it, and *then for only about five minutes* (Rec. pp. 194, 197, int. 17; cross 51). He does not know whether it had double walls or not; it was merely a plain box. He is even doubtful whether it was wood or not (pp. 193, 198, ints. 7; cross 89, 91). He think she saw it afterward on Congress street, but never examined it there. He places it in the kitchen; no other witness does (p. 194, ints. 23, 24).

There were fish on the floor of the box, frozen (p. 193, int. 13). What makes him think they were frozen he does not state.

Robert Keith swears that in March 1858 he received at Cincinnati, from Davis, two barrels of frozen fish, and sold them. He had frequent conversations about that time with Davis about preserving fish, but he is careful not to say how Davis froze these or any fish.

He fixes the date from memory alone. Is "pretty sure it was in March 1858" (p. 138). But in answer to the direct question, what makes him think so, he says, "I don't know as I can think [of] anything. I know it was in the spring, in March" (p. 140).

Afterward he says it was the first year he preserved some quails (p. 140). But he has preserved quails every year since, and he fixes that date by memory alone (p. 141).

He has done a large business in fish, frozen or unfrozen, with Davis every year from 1857 to 1867 (pp. 138, 140, 141).

All his books and correspondence relating to his transactions in 1858 are destroyed (pp. 138, 139).

He cannot say how hard the fish were frozen (p. 138). As they went to Cincinnati from Detroit in common flour barrels, *without any ice*, and were sold by Keith as *fresh fish*, there can be little doubt as to whether they were frozen at all (pp. 138, 139).

Aaron D. Mitchell is produced to prove a use of Piper's process in 1857.

He says that he sold frozen fish for Davis while Davis lived on Jefferson avenue in Detroit, *i.e.*, at some time between February and May 1857. As to the precise date, he thinks it was about the last of March 1857 (Rec. pp. 162, 164, int. 5). The precise date is important, because in freezing weather fish can be frozen in any apparatus, or without any.

How these fish were frozen he does not know (pp. 162, 166, int. 12; cross 35), though he boarded with Davis for weeks on Jefferson avenue and Congress street, where the box was used, and sold fish which he saw taken from it, and was employed by Davis to sell his fish (pp. 162, 163, 164, 166, ints. 17, 37–39; cross 43).

He also says that he sold fish for Davis in the spring of 1857, in Adrian, Michigan, out of an apparatus of Davis'.

No other witness speaks of this Adrian box. S. H. Davis must have known of it, if it ever existed.

We ask attention to the cross-examination of Mitchell about this Adrian use (pp. 166–167, 168–170).

He knows but the single fact that he used the box at Adrian — nothing else. He says that he found it there when he went; where it came from he does not know. It was used only on the street there; was left there on the street every night, and when he came away. He knows nothing about Adrian.

He says that Davis furnished the ice; that is all he knows about it; he does not know whether it was got in Adrian or not; but in the next breath says that he got it himself three quarters of the time in a store close to his stand (p. 168, ints. 78–82).

A sufficient reply to this alleged Adrian prior use is, that no fish were ever frozen in the box at all. When the fish were kept in it three days, he says "*it had the effect to keep them good, or preserve them; that is all*" (p. 163, int. 30). And afterward, when he is

asked whether he froze fish in this box, he says, "No; *I did not freeze them, but just preserved them over night with this ice and salt;* we sold them out readily; that is, I mean, within three days" (p. 171, int. 144).

This disposes of the Adrian apparatus. The patented process was never practised with it.

And more, it is significant in regard to the Columbus use. For this Adrian box was exactly like the Columbus boxes, and if fish were not frozen in that in three days, how could the Columbus boxes have frozen in two hours at the extreme end of the chamber, or nearly a whole chamberful, as the Davises say they did?

Samuel H. Davis swears to the use by his father and himself, in 1857, on the docks in Detroit, of still another apparatus.

Exhibit D he says is an exact model of this box; many fish were frozen and preserved in it (p. 90).

The evidence as to the actual *freezing* by this box is open to the same criticism as that in regard to previous apparatuses. The fish were only put into it to see how long they would keep (p. 90).

But the evidence as to this use on the docks is chiefly remarkable for the additional light which it throws upon the character of S. H. Davis, the main witness for the defence, and through him and other witnesses as to it, upon the nature of the whole defence which he and his brother have arranged.

D. W. Davis, though he must know as much about it as the other, says nothing at all about this box or its use.

S. H. Davis swears that he himself ran it for two months on *Barnum's dock* in the summer of 1857 (pp. 90, 91, 101–104).

It was used, according to him, in Barnum's warehouse, where storing privileges were hired by William Davis of J. W. Barnum. The use was open and public; tons of fish were kept in it (pp. 101–104).

J. W. Barnum was found and is produced as a witness. His evidence will be found on pages 67–69 of the Record, and we ask for it the careful attention of the court.

He personally had charge of all the business on his dock and in his warehouse; gives the whole history of Davis' operations on his

dock, and it appears that William Davis never hired any part of his dock or warehouse, or any privileges there at all; that he never had an apparatus there of any kind whatever; that he never had fish there frozen or unfrozen.

To the same effect George C. Jones, who was on the dock with Barnum, and Hatch, his clerk.

Rec. pp. 34, 30–32.
See also Weber, pp. 37–39.

Such an exposure as this needs no comment. It destroys more than S. H. Davis' testimony.

From Barnum's, Samuel Davis says, they moved to Catlin & Irwin's dock. As the apparatus was then "stored away" (where, he does not know), and no use is alleged there, all that need be said about this is, that Irwin's testimony makes it certain that they were never located on that dock. The most they could have done was to ship over it to a small extent, and this is left more than doubtful (Rec. pp. 33, 34).

Davis says this box was used again *in* 1859 on the De Garmo Jones dock (Rec. pp. 91. 101, 103, 104, 111). This was more than a year after Piper's invention, and is of little importance, except as affecting the value of other evidence in the case, and shewing strikingly the extreme difficulty of correctly fixing the date of any event long past.

Norton B. Rowley swears that he saw Davis using a box like Exhibit D in 1857. But he says it was at Davis' place of business on the De Garmo Jones dock, and Davis never was there till 1859 (pp. 115–117).

Albert Harryman says he saw Davis using it in 1857. But this was on the De Garmo Jones dock, and of course he is mistaken (pp. 127–129).

These witnesses were confronted with their affidavits given on the motion for injunction, and what they say about the remarkable discrepancies between them and their present testimony shews plainly that they were induced to swear positively to some things

which they knew nothing about, and to some things which were positively untrue.

Jarraitt says he made the apparatus like Exhibit D. He is positive that it was in the spring of 1857. His main reason for thinking so is, that his daughter died the following summer, and that he had been sick before that (pp. 92, 94, 119, 121, 122).

His daughter was buried in *July* 1856 (Ancieux, Rec. p. 45).

In view of the evidence as to the use of this box on the docks, his testimony is not important; but he is plainly not to be relied on for dates.

The appellant might, it is submitted, rely upon the character of the evidence for the appellees' of the alleged Davis use, but he has been able to do more. In many instances he has absolutely disproved the appellees' allegations and overthrown their evidence. And he has produced abundance of testimony from men who, it cannot be doubted, would have known it if Davis had ever done what it is now said he had; and not one of them ever heard of artificially frozen fish till after Piper's invention had introduced the process through the country.

Clifton Hadley, who was a fish dealer and an intimate acquaintance of William Davis, both in a friendly and business way, from 1852 in Columbus, to his death in Detroit, and shipped most of his fish to him in Columbus, had frequent conversations with him about his fish business and the keeping of fresh fish while Davis was in Columbus and Sandusky, and he (Hadley) never heard of artificially freezing them, either by Davis or anybody else, till after Piper had put up an apparatus in the West, years after 1858 (Rec. pp. 82, 83).

Anthony and *Alvord*, fish dealers in Sandusky since 1846 and 1857, respectively, never heard of such a thing till about the same time (Rec. pp. 79, 181).

West, a fish dealer in Sandusky, never knew of it till he heard of Piper's invention (Rec. p. 84).

A. M. Campau has been largely interested in the fresh-fish business at Detroit, since 1846, and knew William Davis. He never heard of the artificial freezing process till at least as late as 1863, and then as done in Chicago. In 1864, 1865, 1866, he had frequent conversa-

tions with William Davis "with regard to the freezing of fish and meats generally, freezing of articles largely in use."

In these conversations Davis "thought that fish and meats could be frozen in a box, putting ice around the box. He referred to something he had seen in Central market in New York, *which he thought could be utilized and made valuable.* A year or two after, through his representations, I went down there and saw something such as he described, — a freezing apparatus" (Rec. pp. 23, 24).

This apparatus which Campau saw in New York *was exactly Piper's.*

The defendants would have it believed that William Davis had been successfully and publicly practising the same process for twelve years at this time. And more, that he had built and successfully used two apparatuses like the one in New York, and was actually using one at that very time in Detroit (S. H. Davis, Rec. p. 106.)

J. F. Antisdel has kept hotels in Detroit since 1850. He never heard of artificially frozen fish till years after 1858 (Rec. p. 25). It was to Antisdel's hotel that S. H. Davis says that frozen fish were sold out of the tube apparatus in 1857–8 (Rec. p. 101). He also says they were sold to the Russell house.

Albert F. Draper has been in the hotel business for fourteen years or more. From October 1857 to April 1861 he had entire charge of the Russell house in Detroit, making all the purchases, &c. He never bought or heard of artificially frozen fish till after he left there (Rec. pp. 21, 23).

So *McClatchey*, who was in charge of the store-room, &c., in the Russell house, while Draper was there, never saw any frozen fish there, except those frozen by the weather (pp. 29, 31).

So Maxwell and Whitbeck, both in hotel business (pp. 25, 26, 27).

David C. Dibble, a visitor at Davis' house in 1859, while Davis was in the fish business, and afterward in 1863, never heard of artificially freezing till 1865 (pp. 51, 52, ints. 2–8, 27).

Hiram R. Johnson, Davis' landlord on Congress street, where the tube apparatus is said to have been used, who assisted Davis in his business, never heard of artificial freezing till after Davis was in Russell-house block, which was certainly after 1860; and never

rented Davis the barn where the box is said to have been used (p. 36, ints. 2–6, 12–15).

See also the evidence of the ice dealers in Detroit at that time, some of whom furnished Davis with ice; none of them knew of artificial freezing till after 1860 at the earliest.

Lorman, pp. 26, 27.
Beal, pp. 28, 29.
Whitaker, p. 29.

Beal supplied Davis with ice in 1862 and 1863 for preserving fish, and knows how Davis did it at that time. It was by putting alternate layers of cracked ice and fish in boxes or barrels (p. 28, cross-int. 3, re-direct 1).

Philips, a fish dealer in Detroit for eight years, first heard of artificial freezing about 1868 (pp. 20, 21).

Of the various apparatuses claimed to have involved prior use of the patented process, not one is now in existence. The Northwood, the Columbus, and the box like the one at Columbus, disappeared, no one knows how. The tube apparatus was torn to pieces. Another like Exhibit D was destroyed in 1862 (Rec. p. 105). Still another like Exhibit B was used till 1866, and then that was destroyed. Then still another was built like Exhibit D, except that the ice chamber was in the centre (p. 106).

And all from 1851 are claimed to have been perfectly successful in accomplishing a most valuable practical result; yet all were destroyed, and nothing was done with the invention.

The explanation given of these continual abandonments and changes of successful machines, and Davis' behaviour, — that he was seeking a circulation of air — has been already considered. His patent is a conclusive reply. No circulation of air is mentioned in it, and none is possible in the apparatus described.

The appellees endeavoured to shew by Howell, Scott, Skehan and Conquest, that fish have been frozen and preserved since the appellant's patent, with communication between the freezing mixture and the atmosphere in which the fish are kept. The inference desired is, that the invention is not useful. The evidence was objected to; and

the defence not having been set up in the answer, it is not admissible.

If reply is needed, it is found in Howell's patents and testimony, which shew no such communication, but an arrangement to prevent it; in the master's report as to the Boston apparatus to which Conquest refers; in the testimony of Scott and Skehan themselves, and the circumstances of the case.

An expert, McGillycuddy, testifies to the success of a Davis patented refrigerator in preserving, without freezing, meats and fruits. His evidence is immaterial, because it touches neither the validity of the appellant's patent nor the infringement of it by the appellees; and accordingly it is not criticised.

INFRINGEMENT.

Infringement is proved (Rec. pp. 10–17).

Upon the whole case the decree should be reversed.

The ice-cream process was not an anticipation of the appellant's invention.

Prior use by William Davis is not shewn.

The story itself is improbable, and the burden being upon the appellees, the evidence to sustain it should be clear and positive. The testimony for the appellees is inconsistent, untrustworthy, and insufficient to prove such a use as should destroy the appellant's patent. Its own character and the appellant's reply to it are conclusive against this part of the defence.

CAUSTEN BROWNE,
for Appellant.

United States Supreme Court

No. 240.

ENOCH PIPER

APPELLANT,

VS.

GEO. T. MOON, ET AL.

APPELLEES.

BRIEF FOR APPELLEES

—BY—

GEORGE GIFFORD, Esq.

JERSEY CITY:
EVENING JOURNAL PRINT, 142 & 144 GREENE STREET.
1875.

United States Supreme Court.

ENOCH PIPER,
Appellant,
vs.
GEORGE T. MOON, *et al.*

This is a suit for the infringement of a patent. The bill and answer are in the usual form. The defence is want of novelty.

The first question is, what is the scope of the patent? To determine what is patented, attention must be given particularly to two parts of the specification of the patent; the first is where the inventor announces to the public what invention he has made, and defines its nature; the second is the claim in which he sums up by again defining what he intends to patent.

In the statement by the patentee of the nature of his invention, he says:—

> "The nature of my invention consists in a method of *preserving fish and other articles* by placing them within a chamber and cooling the latter by means of a freezing mixture, so applied that no communication shall exist between the interior of the preserving chamber and that of the vessels in which the freezing mixture is placed."

He, for the purpose of further defining his alleged invention, and having it seen in contrast with what he assumed was the old method, states what he understood to be the only old method, thus:—

> "Hitherto the only method in use for preserving this kind of fish in a fresh state, has been to pack them with crushed ice in barrels or boxes. This method, however, owing to the melting of the ice and the consequent moistening of the fish, fails to preserve them fresh and good for more than a month at most; whereas, by my new method and treatment they can be kept as fresh and sweet as when first caught, and for any desirable length of time, even for years."

He then, in conclusion, ignores all limitation to any particular *kind* of apparatus, and all limitation to preliminary freezing and coating, and asserts his claim in absolute and unequivocal terms, thus:—

> "Preserving fish or other articles in a close chamber by means of a freezing mixture having no contact with the atmosphere of the preserving chamber, substantially as set forth."

THE THING PATENTED.

It is plain and certain—

1st. That the thing patented is a *process*.

2d. That it is not limited to any particular *kind* of apparatus, but includes the doing of the thing by any kind of apparatus in which the air of the preserving chamber is excluded from the freezing mixture.

3d. That the process patented consists of the *act* of "*preserving* fish or *other articles* in a close chamber, by means of a freezing mixture having no contact with the atmosphere of the preserving chamber."

Such is the invention patented. The addition to the claim of the words "substantially as set forth," does not restrict or modify the claim beyond what is above stated, because, on referring to the description, nothing is found which limits the scope of the claim beyond what is above stated.

The specification explains that the method "substantially as set forth" consists of placing the article to be preserved "within a chamber and cooling" it "by means of a freezing mixture so applied that no atmospheric communication shall exist between the interior of the preserving chamber and the freezing mixture." That is the way substantially set forth.

The process patented includes the *doing* of the thing by the use of any kind of apparatus in which the article to be treated is in a close vessel, the atmosphere of which is not in contact with the freezing mixture. If the article to be preserved or frozen is in a close vessel, the operation is equally within the patent, whether the freezing mixture is piled up on such close vessel, or is in another vessel and surrounds the close vessel, or is enclosed in a vessel placed within the preserving chamber. Whenever an article is frozen or preserved in a close vessel by the use of a freezing mixture, which freezing mixture is not in contact with the air contained in the close vessel, the patented process is practiced. If the article to be treated be enclosed in a vessel, and the freezing mixture be enclosed in another vessel, and this latter vessel be

placed in the former one, and the article be thus frozen or preserved, the patented process is used; also, if a freezing mixture be placed in a vessel either open or enclosed, and the article to be treated be enclosed in another vessel, and this latter vessel be placed within the former, and the article be thus treated or preserved, the patented process is used. So, too, if a fish or other article to be treated be enclosed in a vessel setting on the floor, and the freezing mixture be piled up around the vessel, and the fish or other article to be treated be thus frozen or preserved, it would be using the patented process.

Such is plainly the scope of the patent, and such is the construction given it by the learned Judge in the suit in Boston. In his opinion in that case he says:—

> "The complainant's bill claims as his invention, an 'Improvement in the method of preserving fish and other articles.' The method claimed is described as '*A method of preserving fish or other articles*, by placing them within a chamber and cooling the latter by means of a freezing mixture, so applied that no communication shall exist between the interior of the preserving chamber and that of the vessel in which the freezing mixture is placed.' The patent describes it as 'A new and useful method of preserving fish.' The claim in the patent is 'Preserving fish or other articles in a close chamber by means of a freezing mixture, having no contact with the atmosphere of the preserving chamber substantially, as set forth.'"

Now let us see what essentials this process is composed of.

1st. There must be an article to preserve.

2d. It must be in a close chamber.

3d. There must be a freezing mixture.

4th. The *freezing mixture* must have substantially no contact with the atmosphere of the chamber in which the article to be preserved is placed.

5th. The article in the preserving chamber must by these means be preserved.

Wherever and whenever these five things are used together the patented process is employed. If the five things be present no one need look further for the patented process.

The process patented being composed of the five elements or parts above enumerated, it follows that wherever these elements are found in combination, there the patented process will be found, whether it be in an alleged infringement or in a prior use. There must be an *article* to be operated upon, a *place* for that article, a *condition* of that place, an *agency* to extract caloric from that place, a *certain relation* between the article to be preserved and the agency for extracting the heat, and a *preservation* of the article. Wherever those parts and conditions exist, there is the patented invention. If they were in existence together prior to the time of the alleged invention of Mr. Piper, then his patent, like many others from similar causes, is invalid.

WHAT THE PATENT IS NOT LIMITED TO.

It is certainly immaterial to the patent as to what shall be the size of the preserving chamber, or of what mate-

rial it shall be composed, or how thick or thin its sides shall be. The patent has no limitation to anything of this kind.

1st. It is not limited to any *kind of apparatus*, except that the preserving chamber must be "close" and in such relation to the freezing mixture receptacle (which need not be close) that the latter can extract caloric from the former.

2d. It is not limited to any *kind of article* to be preserved or frozen.

3d. It is not limited to any particular *length of time* of preserving it in a frozen state or of preserving it in any other state.

4th. It is not limited to any particular *temperature* especially, so long as it is below the freezing point. But the specification does not even limit the temperature to a degree below the freezing point.

5th. It is not limited to freezing articles or preserving them in a frozen state, but covers the *preserving* of them by the means described, whether frozen or not.

The patent nowhere says that the article to be preserved must be frozen, nor does it describe conditions of the operation from which, of necessity, the article to be preserved must be frozen. It first states that the nature of the "invention consists in a method of preserving fish and other articles by placing them within a chamber and cooling the latter by means of a freezing mixture." It does not say to what degree it is to be cooled. Then, after describing an apparatus, it adds, "the temperature of the preserving chamber can be maintained for any

length of time below the freezing point, and fish surrounded by this dry and freezing atmosphere will be preserved," etc. This is a statement only of what *can*, not of what *must* be done. It is not given as a limitation of the process patented to a temperature below or at the freezing point. It simply states what was well known, that is, that by the use of a freezing mixture you can cool the air in the interior of a vessel down to below the freezing point. Cooling the interior of the preserving chamber down to 34 degrees and preserving an article in it would be as much an infringement of the patent as cooling it down to 30 degrees.

Preserving fruit by such means and in such apparatus would be within the patent. Refrigerator railroad cars, which are extensively used for the transportation and preservation of fruit, have the interior of their preserving apartments cooled by freezing mixtures, but, of course, not cooled down to below the *freezing* point.

The learned Judge in stating the claim in the Boston suit, said the claim was—

> "For the method of preserving fish or other articles in a close chamber, by means of a freezing mixture having no contact with the atmosphere of the preserving chamber."

What, now, is the evidence in this case of prior uses ot the process patented by Piper?

ICE CREAM FREEZER.

The first is of the ice cream freezer, the prior use of which is proved by the depositions of

W. D. Hewlett, folio 464, Record.

E. A. Day, folio 474, Record.
S. H. Davis, folio 169, Record.
C. June, folio 249, Record.
J. F. Neereamer, folio 433, Record.
P. B. Dartois, folio 471, Record.

and is not denied. There is no controverted question of fact respecting what was the common use of this apparatus. The question on that is as to whether or not the patent covers that use. In the ordinary use of the ice cream freezer there existed the five elements constituting the patented process, and they were all in the same relation to one another as they are in the patented process. There was—

1st. The article to be frozen and preserved in a frozen state, that is the cream.

2d. The close chamber into which the cream was placed.

3d. Another vessel containing the freezing mixture.

4th. There was no atmospheric communication between the two chambers or vessels.

5th. The article was both frozen and preserved in a frozen state by means of the freezing mixture.

Here, then, in even the ordinary use of the ice cream freezer were all the parts and all the conditions required to bring it within the process patented by Mr. Piper.

It is identically the thing patented.

It is not necessary to add anything to or take anything from the old ordinary use of the ice cream freezer in order to bring it fully within the patent. Indeed, nothing can be added to it, or taken from it, to make it more identically the thing patented than it actually was.

In the old and common use of the ice cream freezer it was the practice not only to freeze the article but to preserve it in a frozen state as long as desired, always for considerable time, frequently for days, and sometimes longer.

The prolongation of the time of preserving the article in a frozen state was accomplished by the use of the ice cream freezer the same as it is in the patented process of Piper, that is, by renewing the freezing mixture as it became exhausted. *Hewlett* [folio 465] states that it was his custom, in 1847, in the use of the ice cream freezer, to preserve the cream in a frozen state from ten to twelve hours, and that there would have been no difficulty in preserving it in a frozen state longer.

Dartois, who had been in the ice cream business over twenty years, testifies, at folio 471, that he once preserved cream in a frozen state, by the ice cream freezer, twenty-four days.

Day, a member of the firm of Morrow & Day, confectioners in Jersey City, who has been familiar with the use of ice cream freezers for nineteen years, identifies the ice cream freezer Exhibit No. 1 and No. 2, and states that they preserved their ice cream in a frozen state by the use of such an apparatus, for twenty-four hours by once packing the freezing mixture, except having the wooden tub thicker, and adds that by renewing the ice and salt you could preserve the cream in a frozen state for an indefinite period; at folio 477, he states that to preserve the cream by the old process, they first froze it, then drew off the water, then repacked the ice and salt, and covered both the enclosed can of cream and the tub containing the ice and salt with a cloth.

Davis says that he first made ice cream in 1851. He made it in a tight tin cylinder surrounded by the freezing mixture, between which and the interior of the cylinder there was no communication, and that if they were in a hurry they turned the cylinder, but that it would freeze without [folios 169 and 170.]

Neereamer says, that while he was at work for Davis, and prior to 1853, they froze chickens in an ice cream freezer.

Appellant's counsel, feeling the force of this testimony made an attempt to weaken it by proving that in freezing cream it was customary to stir it while being frozen, but this was a fruitless effort because the proof is that both ways were practiced—one was to stir the cream while being frozen, and the other was to allow it to remain stationary while being frozen.

Charles June [folio 250, Record] states that it was his practice to turn the cream when in a hurry, as it would facilitate the freezing, but that he often froze it without turning, but allowing the can containing the cream to remain stationary in the freezing mixture.

Hewlett [folio 467] states that it was his practice after putting the cream in a tin can, and covering it tightly with a tin cover, and placing the can in a freezing mixture contained in a wooden vessel, to then cover the whole with a blanket, and set it aside and leave it stationary till frozen.

Dartois [folio 473] states that although it was his practice to work the cream while being frozen, it would freeze without such working. Thus it is fully proved that one of the old ordinary uses of the ice cream freezer was to freeze the cream without its being agitated.

But if it had been the universal practice to stir the cream while being frozen, that fact would have been immaterial, because—

1st. The patent is for preserving—and if frozen, it is for preserving—in a frozen state after being frozen, and there is no pretence that the cream was stirred or the can containing it turned by anyone while it was being kept or preserved in a frozen state.

Morrow & Day did not stir their cream night and day during the twenty-four hours, nor did Dartois stir his twenty-four days while it was being preserved in a frozen state.

2d. The patent is not for allowing the article to remain stationary while being frozen or preserved in a frozen state, in contradistinction to its being moved while being thus frozen or preserved. Turning or moving a fish while being frozen or preserved in a frozen state by the use of the apparatus described by Piper, would be as palpable an infringement upon his patent as if the fish were not so moved or turned. The ice cream freezer, and the manner of using it for freezing cream, would freeze other articles in place of the cream, without the least difficulty.

Harrison, at folio 252, says that prior to August, 1857, he saw a Mrs. Davidson freeze chickens in a covered pail, which was placed in a tub, surrounded by ice and salt, having no communication between the inside of the pail and the freezing mixture.

To put this matter entirely at rest, and show that hard substances can be frozen and preserved in a frozen state

by the same process as were used for cream, counsel for Appellees caused the fact to be illustrated by a fish weighing about four and three-quarters pounds being so frozen. This is testified to by Hewlett [folio 466 and 467], and it demonstrates, what however was obvious without the demonstration, that solids can be as easily frozen and preserved in an ice cream freezer, and by its old and common use, as anything else, and that all that was necessary to accomplish it was to put the solid in the freezer instead of the cream.

On the question of identity between the use of the ice cream freezer and what is covered by Mr. Piper's patent, I now propose to apply a test which is often invoked, and which will prove in the most satisfactory manner that this patent was ante-dated by the old use of the ice cream freezer. This test is by considering the use of the ice cream freezer, as if it were an alleged infringement of the patent. The question of identity between a patented invention, and another alleged to be like it is the same, and is to be determined on the same principles, whether it be on a question of infringement or a question of prior use. If a machine or a process be within a patent on the question of infringement, it must also be within the patent on the question of prior use. It cannot be *within* the patent for one purpose, and *out* of it for another purpose. A patentee is not entitled to one rule of construction as against an alleged infringement, and to another rule of construction as against a prior invention.

In applying this rule to the case under consideration, it will be seen that if the use of the ice cream freezer had succeeded, instead of preceding, as it did, the Appellant's invention, and had been prosecuted as an infringement,

there would have been no way of escaping the charge. Let this be tested.

Suppose a suit were now pending by Appellant on his patent, against A for the use of the ice cream freezer, and it should appear that Appellant's invention ante-dated the use of the ice cream freezer, what could the defendant A, in such suit, say or do to escape liability?

What would be his defence? He would have to admit:—

1st. That he had an article to be preserved, and while in a frozen state.

2d. That it was in a close vessel or chamber.

3d. That he employed a freezing mixture to cool the air in that vessel.

4th. That the freezing mixture had no contact with the atmosphere of the chamber in which the article to be preserved was placed.

5th. That he preserved the articles in such preserving chamber by these means, and while in a frozen state.

With these things admitted, what would remain to be shown to prove infringement? Obviously nothing, as these things constitute exactly the process patented.

It follows, therefore, that the use of the ice cream freezer is within the patent, and being older than the invention of the patentee, it invalidates the patent, and it alone is a sufficient defence in this suit.

If, in such suit the defendant were to say cream is a fluid, the answers would be: 1st. It is not a fluid when

frozen, and while being preserved in a frozen state; and 2d. It is an article, and the patent is for preserving an article whether a frozen fluid or other solid, and is not limited to any particular kind of article.

If he were to say that the practice in the use of the ice cream freezer was to preserve the cream in a frozen state for *only a short time*, the answer would be that if that were true, it would not be material because the use of the process is not limited by the patent to any particular time of preserving; but it is not true, because the testimony shows that the practice was and is to preserve the cream in a frozen state a long time, and that the time was extended to any desired length by a continued application of the same means, that is by renewing the freezing mixture.

If he should say that in the use of the ice cream freezer the freezing mixture was *outside* of the chamber containing the article to be preserved, the answer would be that that is entirely immaterial, because the patent makes no distinction as to which shall be outside of the other.

If he should say that in the use of the ice cream freezer the freezing mixture was in a vessel without a cover, the answer would be, that is immaterial because there is no such limitation in the patent; and furthermore, the evidence shows it was the custom to cover the freezing mixture vessel with a cloth.

If he should say that in the ice cream freezer the vessel containing the article to be preserved *did not have double walls*, the answer would be, first, that is matter belonging entirely to the construction of the apparatus

and not to the process; the practice of the thing patented is not limited to a kind of apparatus any further than to have a close chamber for the article to be frozen or preserved in, the atmosphere of which is not to be connected with the freezing mixture; second, the claim expressly excludes any further limitation to kind or construction of apparatus, and the specification also expressly disclaims any further limitation, in the following words: "I do not desire to be understood as confining myself to the use of the specific apparatus above described."

It is respectfully submitted that the uses proved to have been made of the ice cream freezer are ample to invalidate Appellant's patent without anything more being added, and that the Court will not have occasion to look further. But if the Court shall deem it worth while to go further, it will find numerous other instances of prior practical use of the process patented, and employing therein different kinds of apparatus.

WM. DAVIS USED THE PROCESS IN NORTHWOOD.

There is no conflict of testimony on many of the facts connected with this use, and I propose to first separate the facts which I understand not to be controverted from those which are controverted. The following facts are proved by the witnesses on both sides, and must be assumed to be settled:—

1st. The nature of the business in which Davis was engaged required fresh articles on the shortest notice. Parties called at his place in both large and small numbers for meals, without previous notice, which required fresh provisions to be on hand to supply them.

2d. There was no market within three miles of his place from which he could get supplies to meet these sudden demands.

3d. There was no way of preserving meats in a suitable condition for use, except in a cold atmosphere.

4th. The use of cold atmosphere as a means of preserving was familiar to Davis as well as to others. The cold atmosphere for preserving meats in warm weather had been employed by all classes of people from time immemorial. Some for that purpose had put their meats in ice houses; others had put them in refrigerators; others had hung them low down in their wells; others had sought the coolest places in their cellars.

5th. Davis had at his place in Northwood all the necessary apparatus and material for creating and preserving the required temperature of atmosphere which he needed, and which would be most effectual in accomplishing the necessary result.

1st. He had and used an apparatus which would contain the freezing mixture in one apartment, and any article to be preserved in another apartment, with no atmospheric communication between the apartments.

Such were his ice cream freezers, and such, as Appellant's witness, Boyd, testifies, was another box which he also had.

2d. Davis had and used freezing mixtures for freezing; that is, for producing a cold atmosphere sufficient for that purpose. This was done in freezing cream and preserving it in a frozen state.

It follows, therefore, that for the purpose of freezing and preserving meats, Davis needed no apparatus which he did not have, needed no material which he did not have, needed no discovery or knowledge of any fact which he did not have, and needed no necessity of preserving provisions in a cold atmosphere which he did not experience. The presence and urgency of all these circumstances combined to induce him to use a cold and freezing atmosphere to keep his provisions on hand, and in a proper condition for immediate use.

The necessity of doing it, a knowledge of how to do it, and the means of doing it, were all present with him.

Under such circumstances, one would naturally expect that Davis would do exactly what the testimony proves he did do at Northwood—that is, use the means he there had to put and keep his meats in the condition which his business demanded.

With these conceded facts, and independently of any controverted facts, obviously all that was necessary for Davis to practice the patented process at Northwood was to put a fish, chicken, or a piece of other meat in the ice cream freezer instead of the cream, and let it lie there long enough to freeze, and then as much longer as he wished to keep it. Indeed, as the patent is not limited to preserving articles in a frozen state, all that was necessary for Davis to have done to practice the patented process was to put a chicken or piece of other meat in one of his ice cream freezers instead of the cream, and leave it there.

There is conflicting evidence as to whether or not Davis did practice the process at Northwood, but the weight of

evidence is greatly in the affirmative, proving that he did practice it, by freezing and preserving in a frozen state, fish and chickens, and that he did practice it by preserving fish and chickens which were not frozen.

On this point there are three witnesses on the part of the Appellees, S. H. Davis, J. F. Neereamer and Simeon Fought, and three on the part of the Appellant, consisting of John Boyd, James Farr and Joseph Finger. On an examination of the testimony it will be found that that on the part of the Appellees greatly preponderates over the other.

1st. The kind of work of Appellant's three witnesses, and their opportunities of knowing what was done in the cellar at Northwood, were not such as would give them as good an opportunity of knowing how meats were preserved by Davis, as the kind of employment and opportunities of the Appellees' witnesses would give them.

Boyd, one of Appellant's witnesses, says his work was milking cows, setting up ten-pins, turning a revolving swing, and sometimes farming it and gardening it a little, and sometimes he made some ice cream.

Farr, another of Appellant's witnesses, says that his employment was milking cows and working in the fields.

The other of Appellant's witnesses says that he milked twice a day and worked in the fields.

It is proved that Davis' cellar at Northwood was divided into several apartments by brick walls [folio 114]. Boyd, Appellant's witness, says that he went through one apartment and could see into two or three other apartments, on his way. It does not appear that he went into those two or three other apartments.

Farr neither states nor pretends that he went into more than one apartment of the cellar.

Finger says that he was never in any apartment of the cellar except where he saw what he calls an ice box [folio 137].

It was, therefore, impossible for these witnesses to have known what the other apartments of the cellar contained, or what was done therein. None of these witnesses say that if articles had been frozen and preserved in some of the apartments of the cellar, they would be likely to have known it. Nor are they asked anything on that subject. How many boxes did these three Appellant's witnesses see?

Finger says that the one he saw was tinned all around on the inside [folio 137].

Boyd says the box he saw was not lined with zinc, tin or anything of the kind [folio 111].

Farr says the box he saw was made like an ordinary ice box [folio 134].

Boyd says that the box he saw had two compartments in it, and that there was no communication between them, [folios 111, 112 and 113].

Finger says that in the box he saw, there was only one apartment [folio 137.]

Farr says that in the box he saw, there was only one apartment [folio 134].

Boyd says that the box he saw was made of two thicknesses of boards; and that he was told charcoal was between them [folio 111].

Finger says, the outside of the box was two inch plank [folio 138.]

Boyd, at folio 111, says, Davis had no other business there then, except dairy and farming business. On the contrary, it appears, that an important part of Davis' business was the keeping of a sort of a public house, requiring the preservation of meats in warm weather, for the accommodation of transient and unexpected guests.

Now, in view of such confusion in the testimony of these three witnesses, can any one come to a conclusion as to what they did see, or that they knew what they were testifying they saw. They either saw numerous different boxes, or they flatly contradict each other as to the box they did see. If the former, what were all these boxes used for? If the latter, their testimony is discredited by its intrinsic contradictions.

What now is the testimony on the part of the Appellees, as to what was done at Northwood?

S. H. Davis, one of the Appellees' witnesses, was employed to help his father run the place, and actually helped do the work of freezing meats, poultry and fish, [folios 158 and 159]. He, therefore, cannot be mistaken. If he did not see it and do it, he has wilfully perjured himself.

J. F. Neereamer, another of Appellees' witnesses, was a professional confectioner, and worked for Davis during the Summer of 1851, from three to five days a week, at manufacturing ice cream, etc, [folio 433.] He talked with Davis about using the ice cream freezer for freezing meats, [folio 433.] He knew that chickens were frozen

in the ice cream freezer by the use of ice and salt without atmospheric communication between the chickens and the ice and salt, [folios 434 and 436.]

This was done in an apartment of the cellar separate from where the large box was standing.

He received of Mrs. Davis two chickens, thoroughly frozen, on the 25th day of July, 1851, which she took from the box, [folio 434.] It was impossible for this witness to be mistaken, and his statement is either correct, or wilful perjury.

Simeon Fought, the other witness on the part of the Appellees, says that he was often in Davis' place; saw frozen chickens there; talked with Davis about his apparatus for freezing them, and went down into the cellar with Davis to see it, and there saw a box with separate apartments, with meat and fish in it, the apartment containing the meat and fish being of tin and separate from the freezing apartment, [folios 439 and 441.] This witness talked with Davis about freezing chickens in an apparatus; he could not be mistaken in that. Davis took him into the cellar and showed him an apparatus; he could not be mistaken in that. He saw the apparatus and meat and fish in it; in this he certainly could not be mistaken.

The testimony, therefore, as to what was done at Northwood, stands thus: on the part of the Appellees there are three witnesses who testify affirmatively as to what they saw, heard and did. On the part of Appellant there are three witness who testify negatively as to what they did not see, hear or do, and this even without showing that

that they had opportunity of knowing all that was done. Their testimony is not only negative but it is of the weakest kind of negative testimony, because it appears that the facts affirmatively proven by the Appellees' witnesses might easily have existed without the Appellant's witnesses knowing it.

WM. DAVIS USED THE PROCESS AT COLUMBUS.

He moved from Northwood to Columbus in September, 1852, where he kept a hotel one year, and then went into the fish business, that is keeping fish for sale, [folio 160.] This he continued up to the fall of 1855, being about two years. His business there required a cold atmosphere in which to preserve the article he was engaged in selling. It was perfectly natural, therefore, for him to use the same means he had previously used in Northwood. It would have been very unnatural for him to have done otherwise.

But the proof of what was done at Columbus, independently of any inference from what had been done at Northwood, establishes the fact beyond a doubt that the process was used by Davis at Columbus.

S. H. Davis says, that at Columbus, during the warm weather of the years 1854 and 1855, [folio 163] he used for freezing and preserving fish an apparatus which he thus describes [folio 161]—

> "It was one box put inside of another, and that was packed with sawdust—the space between the two boxes, I mean, was packed with sawdust. There was a partition off at one end of the inside box about six or eight inches; the partition con-

> sisted of tin. Then there was a lid on both boxes, a lid on the box for the preserving chamber, and one on the chamber where the freezing mixture was of ice and salt."

He then states that there was no atmospheric communication between the preserving chamber and the place where the freezing mixture was, and goes on to describe the practical method by which the apparatus was used.

At folio 161 he says that ice and salt was the freezing mixture used.

At folios 162 and 163 he says he had in use, at that time and place, two such apparatuses, holding about 500 lbs. each.

Witness, himself, [fol. 163] saw fish frozen in this apparatus at this time, and sold them out of it.

At folio 160 he says:—

> "We froze what was left over from the markets three (3) times a week, and when there was any left over from one market they had to be kept till the next then."

And adds, that they sometimes kept over in this way from one market day to another from one to seven hundred pounds. This witness says that the apparatus thus used agreed with the model Exhibit A, except the apparatus was a double box, and had non-conducting walls [folio 163.]

At folio 185 he says, that sometimes he used the apparatus "to put fish in to freeze them, and sometimes put them in to preserve without freezing."

The testimony of this witness is direct and positive, and consists of a statement of what he saw and actually did himself. He describes the apparatus which was used and which he used, himself. He describes how it was used, when it was used, and for what purpose. He states that he, himself, put articles into the apparatus, preserved them therein, sometimes frozen and sometimes not frozen, and finally, that he took them out of it frozen and so sold them.

There are no circumstances to discredit this testimony. The circumstances are all corroborative of it. The business engaged in required that the fish on hand should be preserved in a cold atmosphere. The Davises were familiar with the means of producing such an atmosphere by their use of the ice cream freezer.

The apparatus they used for the fish at Columbus was on the same principle as the ice cream freezer, and the cold atmosphere was produced with the same materials that were used for its production in the ice cream freezer.

D. W. Davis, at folios 289 and 290, says that during the years 1854 and 1855 he worked with his father, at Columbus, in the fish business, and that they used, for the purpose of freezing and preserving fish, two boxes which—at folio 290, the witness says—were like Exhibit A, only the walls were thicker.

At folio 290 he describes these two boxes in the following language:—

> "He had two boxes; they were alike, as near as I can recollect; they were four and a half feet long, about three feet long, about three feet deep;

there were two chambers in these boxes—one to contain the freezing mixture and the other to contain the fish; the walls were about three or four inches thick; I presume they were packed, I don't know, I never examined; the boxes were there, and made, when I saw them first; there was an opening to each chamber, and a cover made for them."

At folio 290 he says that there was no communication between the two chambers, and then proceeds [folios 291 and 292], to describe how the boxes were used practically, viz., that the fish were put in on slat-work, or shelves, say 300 pounds in a box; that the other chamber in the end of the box was then filled with freezing mixture, and kept full; that the fish were frozen.

At folio 292, he says that they took frozen fish out of the box and delivered them to customers most every week, and in the fall of 1854, and during the spring, summer, and fall of 1855.

At folios 303 and 304, he says he took out of these boxes several hundred pounds of frozen fish himself, and that the boxes, if filled full would all freeze, if the fish were left there long enough.

At folio 304, he says he has seen the fish frozen all over the chamber, at a time when the chamber contained from 100 to 150 pounds of fish.

Now, here is another witness who testifies to substantially the same facts as S. H. Davis, and he too, states what he saw and did himself. He participated in the use of the apparatus, and he took fish in a frozen state out of the apparatus.

Here, then, are two credible witnesses, above even suspicion, who testify to facts about which they could not be mistaken.

W. W. Riley, at folio 455, says that he boarded with Wm. Davis, from January to July 19, 1850, in the city of Columbus. (This was before Davis moved to Northwood.) That said Davis' business at that time was keeping a dairy and selling fish on the market; that he used at that time, for the purpose of preserving fish, a box, which he describes as follows, at folio 456:—

> "He was a well-educated gentleman, and quite scientific, and constructed a box to put his fish in after they came here; he constructed a box, I should think, about three and a half or four feet long, and thirty inches high, and about the same width; it looked like a large chest—something like a sailor's chest; he had a smaller box just like it inside of it, leaving a space between the two boxes; this space he filled with a mixture of pulverized charcoal, I think—something dark—for the purpose of keeping the cold in and the heat out—as a non-conductor, I suppose; he had a box inside of the inner box, for the purpose of putting his freezing mixture in, which was placed either on one side or one end of the inner box, I don't know which; my impression is, across the end; this small box was tight all around, with a lid to it, which closed the freezing mixture up tight; whether that box was movable or not, I don't know; it seems to me he took it out occasionally to clean it and change the mixture."

At folios 456 and 457, he says that there was a cover to the chamber that contained the fish, and that there was no communication between the two chambers.

At folio 458, he says that Davis continued the use of this box all the time he boarded with him, and then says that he saw Davis about the year 1853 or 1854 selling fish out of a box in Columbus, which witness thinks [folio 459] was the same box he had there in 1850.

At folio 461, witness says that the freezing mixture which Mr. Davis used, was pulverized ice and salt.

This witness, when asked if the fish treated in these boxes were frozen, says [folios 459 and 460] that he thinks they were frozen; [folio 457], that they felt solid and firm; that he (Davis) used to put them into cold water when he took them out of the box for family use, and that Davis told him he did this to take the frost out. At folio 461, he says that the fish always seemed to be frosted over.

The testimony of this witness as to what the elder Davis practiced at Columbus, before he moved to Northwood, agrees with what S. H. Davis, on his cross-examination, states his father had told him. He states thus at folio 172:—

> Q. When did you first see the apparatus marked "Exhibit C"; I mean the apparatus of which that (C) is a model?
>
> A. At Northwood, two and a half miles from Columbus.
>
> Q. Was this the first apparatus of the kind that you had ever seen?

A. I had seen an ice cream freezer before, but never saw one used for freezing meats or poultry, previous to that time; I had seen it used for cream.

Q. Was this the first apparatus that your father ever used for the purpose of freezing meats, &c.?

A. No, sir.

Q. What was the first one?

A. I don't recollect what the first one was; father told me he had one, but I never saw it.

J. F. Neereamer, at folio 435, says that Davis kept a fish establishment in Columbus about two years, or perhaps more, after he worked for said Davis. He ceased to work for Davis [folio 433] in the fall of 1851. That said Davis and his son Samuel kept frozen fish during the summer, and that he bought them sometimes from one and sometimes from the other; folio 435 he says he knows how they were frozen, and describes the process as follows:—

"Well, sir, they were packed in tin cans; there was a large tub taken and a quantity of salt and fine ice thrown in the bottom; then the can was placed on this ice and the can then buried in a mixture of salt and ice; then this whole tub was covered tightly, almost to exclude the air, with cloths thrown over it and a cover; the length they remained there I am unable to state."

It must be remembered that this witness was a confectioner, and understood the subject he was testifying about. He could not be mistaken.

Simeon Fought [folio 440] says that the Davises were engaged in the fish business in Columbus some time between 1853 and 1855, and that he frequently bought fish from them which he knows were artificially frozen; folios 440 and 441 he says that he bought these frozen fish in the summer time, and of different members of the Davis family. Here, again, is a witness who testifies positively that he bought frozen fish of Davis in the summer-time that had been artificially frozen.

Jacob S. Ritze, at folio 450, says that he knew Davis in Columbus after he left Northwood; that he purchased fish of him often; and [folios 450 and 451] that sometimes they were frozen and sometimes they were not. When asked, "Can you tell whether you purchased frozen fish one hundred times or no more than five," he says he certainly did more than five times. He says they were frozen in the summer time [folio 451]. At folio 453 he says that sometimes the fish which he bought of Davis were frozen so hard that he had to thaw them apart; and at folio 454, on his re-direct examination, he says he bought frozen fish of Davis in the market.

Here are six witnesses who give positive testimony that the Davises froze fish artificially in Columbus, and three give positive testimony as to the apparatus used for that purpose. These witnesses all had the best opportunities for knowing what was done and how it was done.

S. H. Davis [folio 160] was in the fish business with his father.

D. W. Davis [folio 289] was also in fish business with his father.

W. W. Riley [folio 455] boarded with Davis in forepart of 1850, and knew of his freezing and preserving articles at that time, and how he did it, and in 1853 or '4 knew of his using a similar box.

Simeon Fought [folio 440] frequently bought fish of the Davises between 1853 and 1855.

J. F. Neereamer [folio 433] was a confectioner for Davis at Northwood, and after Davis went to Columbus witness [folio 435] kept up his acquaintance with him, and bought fish sometimes of one member of his family and sometimes of another.

Jacob S. Ritze [folio 449] had known the Davises at Northwood, and supplied them with confections; [folio 450] kept up his acquaintance in Columbus, and often bought fish of them when he, witness, was clerk for some restaurant keepers.

To meet this direct and positive testimony of the use in Columbus, the Appellant has produced four witnesses, only two of whom had any opportunities whatever of knowing what Davis did, and not a single one of whom is able to swear that Davis did not do and have all that the Appellees' testimony affirmatively proves he did.

James Farr, who does not appear to have known anything about Davis when he was in the fish business in Columbus, merely says [folio 135,] that he never heard of any artificially frozen fish in Columbus. According to this witness' own testimony [folio 133], he worked for Davis in Columbus, at the hotel, from September, 1852, to April 1, 1853, and from that time to October 22, 1853, at bottling ale. It does not appear that he ever saw or

heard of Davis or any of his family after that date. It was after Farr left that Davis was in the fish business in Columbus—after he left Northwood.

Hiram Simonton [folio 139] says he kept a hotel in Columbus in 1853 and 1854; and that he bought fish from Mr. Davis for his hotel, but that Davis [folio 140] was not his regular fish dealer.

Then, at folio 139, he says that he never bought, during these years, of Davis, or anybody else, artificially frozen fish, and this is all he knows about it. This is not inconsistent with the fact of Davis selling frozen fish to others. It does not appear that this witness bought any fish of Davis in the summer time.

Peter Ambos is called, folio 141, to swear that he was a member of a firm of confectioners and restaurant keepers from 1852 to 1856; that it was *not* his business to do the marketing in those days, and that he did not know anything about artificially frozen fish at that time. Jacob S. Ritze, the man who did do their marketing, testifies in behalf of the Appellees that he *did* know of such artificially frozen fish. This is characteristic of the testimony in behalf of the two parties. On one side the testimony is of what the witnesses had an opportunity of knowing and did know; on the other side the testimony is of what the witnesses did not have an opportunity of knowing, and therefore did not know.

There is one other witness, Charles A. Wagner, called by the Appellant to say he never knew or heard of Davis having any artificially frozen fish; and although he appears [folio 132] to have been engaged in the fish

business at the market in Columbus when Davis was, yet he says Davis might have had such fish without his knowing it, and [folio 133] explains one way how that could have occurred in the following language:—

> "If he had frozen fish on his stand I would probably have seen them, it I was in market; but I don't think he would expose them on the stand in the summer time."

This witness seems to have been too honest to have his testimony exposed to an erroneous inference of ingenious counsel; and very properly explodes their theory by saying that if Davis had the frozen fish where he would not have been likely to have them, he probably would have seen them.

All the testimony shows that Davis in the summer time kept his fish frozen in his boxes till taken out to deliver to his purchasers. He would have acted the part of an insane man if he had done otherwise. The explanation of this witness applies equally well to the testimony of other fish dealers who testify that they were neighbors of Davis in the market, and did not see him have frozen fish.

DAVIS USED THE PROCESS IN DETROIT.

ON ADAMS AVENUE.

He used it on Adams Avenue.

Three witnesses, A. Haryman, S. H. Davis and D. W. Davis, testify positively to this use.

Albert Haryman states [folio 254] that he went to the house of Davis, on Adams avenue, for a mess of

fish, in November or December, 1856, and that Davis took fish from a box and gave him, which were frozen, and that Davis told him they were artificially frozen; that these were white fish, and later than the season when they caught white fish, and that they were frozen solid.

As the witness says, this was in the month of November or December, if that stood alone, it might be said, although improbable, that these fish had been frozen in the natural state of the atmosphere, yet this cannot be assumed because Davis told the witness that they had been artificially frozen.

S. H. Davis says [folios 189 and 190] that he made the wood-work of this box that was used on Adams avenue, which he thinks was about five feet square; that the metallic tube was procured by his father, and was about ten inches in diameter; that Exhibit B is a model of this apparatus, and that it was used on Adams avenue during the winter of 1856–1857, about three months.

D. W. Davis says [folios 298 and 299] that he knew that the apparatus, of which Exhibit B is a model, was used on Adams avenue. At folio 293 he describes this apparatus in the following language:—

> Q. What, if any, means of preserving fish did your father use prior to 1858?
>
> A. He had a box with non-conducting walls and a tube running down into it. He had a door in the side of it and the waste water ran out through a small pipe in the bottom of the tube. There was a little plug cap that fitted into the tube and

I should judge the tube was tight so that there was no communication from that into the box. It got stopped up once or twice, filled up with water, that is why I think it was tight.

Q. How does the box you have described correspond with Exhibit B?

A. It corresponds with it, with the exception of the walls; the walls were thicker.

To meet this testimony of D. W. Davis and S. H. Davis, who located the house on Adams avenue west of Woodward avenue, the Appellant called two witnesses, L. N. Case and D. C. Holbrook Case only says that in the years 1856–7–8, J. L. Langley was assessed for water rents, and therefore must have owned or occupied the easterly half of a house standing in lot 14, on Adams avenue. He does not say that the rents of *that lot or house* were assessed against Langley. He then says that in May, 1859, Dr. Day "was assessed for the same premises," that is, for the same premises that Langley was assessed for, but what premises they were appears in no way except by inference.

Holbrook says that there were only two double houses on Adams avenue west of Woodward avenue, and between it and the next street; that he owned the whole of one and the west half of the other, and that Davis did not live in what he owned; that Langley, in 1856–7, resided in the East half of the double house on lot 14, and that he never knew Wm. Davis till about ten years after, namely, in 1866. So far Case and Holbrook have spoken only of house on lot 14. The cross-examination of Holbrook is important. On his cross-examination he says that Spillane owned the east half of the house on lot 11,

and that he does not know who lived there in the fall of 1856 or 1857, and that he cannot say whether Davis lived in that house in 1856 or 1857, or not.

In explanation of and to clear up this apparent confusion, Mrs. Spillane, the widow of the man who Holbrook says owned the house on lot 11, was called on the part of the Appellees, and she swears [folio 364] that she lived in that house next to Holbrook's, and moved out in the fall of 1856, for Davis to move in. She says the house was No. 10 Adams avenue. Whether the numbers have been changed, or why the lots had one number and the houses occupying parts of the lots had another, causing Holbrook to say No. 11, and Mrs. Spillane No. 10, does not appear. Undoubtedly Holbrook and Mrs. Spillane referred to the same house. Holbrook testified on his cross-examination [folio 92] as follows:—

> Q. 1. Did you ever know a man by the name of Spillane?
>
> A. Yes, sir.
>
> Q. 2. Did he not in 1856 or 1857 own a part or the whole of one of those double houses, of which you have spoken?
>
> A. Mr. Spillane owned the east half of that house which is next to my residence, and on lot 11.
>
> Q. 3. Do you know who lived in that house in December, 1856?
>
> A. No; I do not.
>
> Q. 4. Do you know who lived in that house any time in 1857?
>
> A. No; I can't place any person there.

Mrs. Spillane says that she moved out of this house

in the fall of 1856, for Davis to move in, and there is nothing in contradiction of that.

Albert Haryman, a witness on the part of the Appellees, after testifying that Davis lived on Adams avenue, said he thought the house was east of Woodward avenue. To show that the house was not on the east side of Woodward avenue, Appellant called Eugene Robinson, a surveyor. This was not necessary, because it had already appeared, both from the testimony of Holbrook and Mrs. Spillane, that the house was on the west side of that avenue, and that Haryman was under a wrong impression when he said he thought it was on the east side.

To further prove that Davis lived on Adams avenue in the fall of 1856, the Appellees called his two daughters, Mrs. Rayl and Mrs. Worman [fols. 243 and 247–248], who testify positively to their father's residing there in the fall of 1856. A. D. Mitchell also testifies to his residence on Adams avenue, making seven witnesses who testify positively to Davis living on Adams avenue, and three who testify to his having used the patented process there. To be able to contend that he did not use the process there, the effort was made to prove that he did not live there; this effort is met and rendered useless by the positive testimony of the seven witnesses who testify that he did live there.

All the testimony respecting Davis' living on Adams avenue concurs in establishing the following facts, and there is nothing in contradiction of them :—

1st. That Davis did live somewhere on Adams avenue in 1856.

2d. That he lived in some house.

3d. That that house was on the west side of Woodward avenue.

I need not here add that the discrepancies in the details of the statements of witnesses, when they agree on the essential facts, tend to strengthen rather than weaken their testimony. It is not material whether Davis lived in a part of a single house or a part of a double house, or whether it was at No. 10 or No. 11, or whether it was on the west side or east side of Woodward avenue, so long as all of the witnesses who had knowledge on the subject testify that he lived on Adams avenue, and there used the process.

There is no attempt to prove that Davis did not use the process in the fall and winter of 1856 otherwise than by showing that he did not live on Adams avenue as the Appellees' witnesses say he did. The issue made and contested respecting his use in the fall of 1856, is only as to whether or not he then lived on Adams avenue, and the testimony is conclusive that he did live there.

ALSO IN JEFFERSON AVENUE.

Davis used the process on Jefferson avenue.

It is not denied that Davis lived on Jefferson avenue.

There are seven witnesses who testify that Davis used the process at the Chapaton House on Jefferson avenue:

S. H. Davis [folio 190].
D. W. Davis [folios 299 and 301].
S. Barlin [folio 265 to 268].
G. H. Harrington [folio 401 to 404].

This witness describes the apparatus used, where it stood, and saw fish taken out of it in a frozen state.

A. D. Mitchell [folio 334 to 337].

Mrs. Rayl [folio 243 to 246] says her father left Adams avenue in 1857, and then went to live on Jefferson avenue; that he was there in the fish business, and she saw frozen fish there in warm weather; they were hard; that she saw there a box for preserving fish; and saw frozen fish taken out of the box.

Mrs. Worman, another daughter of Wm. Davis [folio 248], testifies, although she was young, that she remembers that her father was in the fish business on Jefferson avenue, and of seeing frozen fish there.

Here, then, are seven witnesses respecting what was done on Jefferson avenue, six of whom saw the apparatus used and knew of fresh fish being frozen in it, being five, without either of the daughters. How, now, does the Appellant attempt to meet this testimony, as to the use on Jefferson avenue?

The only way he attempts to answer this testimony is by undertaking to show that Barlin was not in Detroit at the time he says he was.

Well, what if he was not? What if he was mistaken? Is this an answer to the positive testimony of the five other witnesses who testify to what they saw there? No attempt was made to prove directly that the process was not used there, or that nothing of the kind was known there by any witness who had an opportunity of knowing, or by any circumstance. What matters it, therefore, in regard to the fact, or the proof of the fact,

whether Barlin's testimony is in or out of the case? Suppose it to be out, there still remains the testimony of five witnesses who testify to their knowledge of the fact of use at this place. Are not five witnesses sufficient to prove one fact?

As to whether or not Barlin worked for Davis on Jefferson avenue, the testimony is conflicting. And as the testimony of the other witnesses is sufficient to establish the fact, without that of Barlin, the Court might properly omit an examination of the testimony to ascertain whether Barlin did or did not work for Davis at that time. The testimony, however, on the part of the Appellees, to show that Barlin did then work for Davis, is mostly direct and positive, while that on the part of the Appellant, to show that he was not there, is chiefly circumstantial and inferential.

I will first call attention to the testimony on the part of the Appellees showing that Barlin was in Detroit. Barlin swears positively [folio 265,] that he came to Detroit in 1856; and that he [folio 266 to 269,] worked for Davis in freezing articles, breaking ice, &c., from that time.

S. H. Davis [folio 377,] says that Barlin worked for Davis in 1857, breaking ice and helping to handle fish, sawing wood, &c.

W. R. Hines [folio 383] knew Barlin in 1857 or 1858, and says that Barlin worked for Davis around the house; saw him several times [folio 384].

Mrs. Rayl, a daughter of Davis, says Barlin worked for Davis first in 1857, and that she taught him to read and write on a slate [folio 381]. This is a fact which the witness would be likely to remember.

Mrs. Worman says that Barlin worked for her father in 1857, as near as she recollects [folio 378].

Geo. W. Hector says he worked for C. Shippay in 1856, in Detroit, and then knew Barlin, and was with him every day for a month or so, and fixes date by Buchanan's election [folios 371 and 372]. This is a circumstance the witness would be likely to remember.

J. F. Mitchell says he knew Barlin in 1857, and fixes date by rent receipt, and that Barlin cut wood for him [folio 390^6].

W. P. Smith says he knew of Barlin in Detroit, in 1857, for witness was then with Sutherland & Foote [folio 390].

G. De Baptist says that as near as he can recollect, he saw Barlin in or about the market in Detroit frequently in 1857 [folio 390^4].

Harrington remembers a colored boy at Davis' house [folio 404].

I will next call attention to the testimony on the part of the Appellant, offered to show that Barlin was not in Detroit.

Martha J. Johnson, a colored woman, does not say that she knew when Barlin's mother came to Detroit first, but testifies only from what she says Barlin's mother told her. Among other mistakes, she says the war commenced in 1860.

Peltier says that he found Barlin's name in a directory of 1862, but could not find it earlier. Martha J. Johnson said the Barlins were there in 1860. If that be so, it

accounts for Barlin's name not being in the directory in 1857, because there was no more reason why their names should have been out of the directory in 1860 and 1861, when they were there, than there was why it should be out of the directory previous to that time.

S. Clark, a colored woman, says that she twice lived in Schulte's house. That when she was there the first time Barlin's mother was not there; that when she went there to live the second time, which was during the war, Barlin's mother was there. On her cross-examination she says that she does not know how long before the war she moved out of Schulte's house the first time; that she don't know whether it was three years, six years, or how long. This testimony does not tend to prove that Barlin's mother was not in Detroit in 1857, because, if it were six years before the war that the witness moved out of the Schulte house, it was early as 1855, and there is no pretence that Barlin's mother was in Detroit as early as that.

Elizabeth Schulte did not profess to know anything about when Barlin and his mother came to Detroit, but testifies only from what she says Barlin's mother told her, which of course is only hearsay evidence.

Amanda Needham, a colored woman, says nothing on the subject except that she lived in Schulte's house in 1859, and that the Barlins did not like there then. The witness don't say whether it was a month, a week or only a day, that she lived there in 1859.

Anna Thomas, a colored woman, says that she now knows the Barlins; that she lived one month in Shulte's house, and that they were not then there; that she

moved back probably in 1862, and the Barlins were there, and she never knew them before. Now, if this witness didn't happen to form the acquaintance of the Barlins during the short period of a month, when she was there the first time, she would not have been likely to know whether they were there or not at that time, but would know them now from the acquaintance she formed with them in 1862.

R. Morton, a colored man, says that he lived in Schulte's house in 1859, and that the Barlins were not then there. He gets at the time only by an entry in a Bible, without its appearing when the entry was made, or by whom it was made.

There are five more witnesses on this subject, on the part of the Appellant, three of whom were colored, but those whose testimony has been noticed may be regarded as a fair illustration of what the others are.

After wading through this mass of irrelevant and random evidence let us now return to what is important, and see if the statements of Barlin are not consistent and uncontradicted, to the effect that he worked for Davis, on Jefferson avenue, as he states he did.

Barlin [folio 265] says that he came from New Orleans in October, 1856. That he got acquainted with Davis in the spring of 1857. That [folio 268] he lived at No. 125 Lafayette street East.

The great effort made by Appellant to show that Barlin was not in Detroit in the fall of 1856, was to prove that he did not at that time live in certain houses. Now Barlin swore that he lived at 125 Lafayette street East, and not a single witness was called by the Appel-

lant, who could swear that Barlin did not live at 125 Lafayette street East, at the time he says he did. So that his testimony as to this controlling fact is entirely uncontradicted.

USES OF THE PROCESS BY DAVIS, ON THE DOCKS AT DETROIT.

On the De Garmo Jones Dock.

It appears from the testimony that it was the practice of Davis to receive fish as well as other articles, and pack and re-ship them, and that he did this sometimes on docks, and that preparatory to packing fish in the summer, he would freeze them. This he could do, and did do, by having his apparatus setting at any convenient place on a dock, either out of doors or in a building.

Fish business at Detroit at that time [folio 208] was very light; nothing like what it is now. It would not have been profitable to engage in it extensively.

Davis used the process on this dock.

Norton B. Rowley, a dealer in scales, whose business was located on Woodbridge street [folios 225 and 226], says that he saw Davis have frozen fish on this dock in the summer of 1857, and that he had a fish-box there which he opened for the witness, and in which the witness saw fish frozen stiff—thinks as much as one hundred pounds --and [folio 227] a cup of frozen milk. This, he remembers, was the year after Fremont ran for President. That Davis showed where the freezing mixture was, by which the fish were frozen, and that it was in a box, which was inside of the other box. That this fish box [folio 228] was not in the warehouse, but was on the dock; that [folio 226] it was on Sunday and the

witness was on the dock waiting for the Saginaw boat to come in. He was expecting an engine to come on that boat for his shop.

Albert Haryman says, at folio 254, that he got acquainted with William Davis in the fall of 1856, on a dock; that witness' business then was checking goods on the dock; that [folio 256] in the spring of 1857 he was first mate of the steamboat Bay City, and that during that spring and the fore part of the summer, they carried a good deal of fruit and perishable property for Mr. Davis, who requested witness to take particular care of it; that he saw frozen fish in the possession of Davis in the summer of 1857; that Davis told him he would give him a mess of fish to take home, and did give him a mess of frozen fish; that he saw the box where the fish were kept by Davis; that it was from 4 to 6 feet long, about 3 feet deep, and 3 feet wide, with a partition of tin across one end; that the box had an outside and inside lid to it; that, as he understood from Mr. Davis, the walls of the box were made double; that "Exhibit D" resembles the box he then and there saw; that there was ice and salt in one of the chambers of the box, and fish in the other, which were frozen solid; that he had fish out of this box at two different times [folio 256 to 258]; that he thinks this dock, where the box was, was the De Garmo Jones Dock.

The box, its construction, and the frozen fish and the season of the year, are facts which, from the nature of the circumstances, are such that the witness could not be mistaken about them. He was not sure that it was the De Garmo Jones Dock, but it is entirely immaterial whether it was that dock or another.

On the Barnum Dock.

N. B. Rowley [folios 228, 230, 231,] says that Wm. Davis' place of business in 1857 was on Barnum's Dock.

S. H. Davis says the same thing, but that they only procured storage there, and shipped stuff over the dock, a part of which was fish [folio 194].

In opposition to this the Appellant calls J. W. Barnum, G. C. Jones, J. C. Hatch and George Weber. These witnesses corroborate Appellees' witnesses to the extent that Davis did do business there in the summer of 1857, in shipping articles to other markets, but say that they did not know of his freezing fish there, or having a box there for that purpose. This may be so, and yet, notwithstanding that, he may have had it there. These witnesses do not agree with one another in their recollection of what did occur. Barnum says [folio 123] that Davis had shipping business at that dock. Hatch says [folio 60] that he did not, to his knowledge, do such business over that dock. This same Hatch [at folio 59,] first says positively that Davis did not, at that place, freeze fish, or use a box there for any such purpose; and then, on his cross-examination [at folio 60], he says that he does not know whether Davis had a box there for freezing fish or not.

Jones says simply that he has no recollection of Davis having a box on that dock to freeze fish. Weber says that he was casually in and out of the warehouse on the Barnum dock, and does not remember seeing any box for freezing fish. His testimony shows that his memory was very treacherous in other matters.

On Other Docks.

Thomas S. Sprague, who is President of the Toledo, Thorntown & St. Louis Railroad Co., is called as a witness on the part of the Appellees as to what he saw and knew of Davis' operations in freezing fish, and packing frozen fish for shipment on a dock in Detroit. This is a witness of intelligence and position, which entitle his testimony to the fullest credit, and even if what he says was not corroborated by other evidence, it ought to be sufficient to establish the facts which he testifies to.

The testimony of this witness proves that Davis, while living in Sandusky, and before he moved to Detroit, to wit, in the summer of 1856, came to Detroit with his apparatus for freezing fish so as to pack them in a frozen state for transportation to Cincinnati.

Mr. Sprague's deposition is folio 324 to 334, in which he says, that in the summer of 1856 he saw Davis on the dock in Detroit, where the Sandusky steamers landed, taking frozen fish out of a box and packing them into a barrel in sawdust. He describes the difference between the box which Davis then and there had, and Exhibit B. Davis opened the box and showed him its contents. It contained white fish and trout, of which he handled some, and they were rigid frozen. Davis told him that the fish he was packing in sawdust were going to Cincinnati. Mr. Sprague at this time purchased of Davis a white fish and a trout. Some two or three weeks after he purchased more fish of Mr. Davis on this dock. Later in the season he met Davis in the street in Detroit, when Davis told him he had just removed from Sandusky to Detroit.

The testimony of this witness explains what otherwise might not be readily understood respecting Davis' business and operation on the docks in Detroit. A part of this business was to receive fresh fish, prepare them for sale or transportation by freezing them in his apparatus, and then sell them therefrom or pack them for transportation. To freeze them he required nothing but his box, and in case of packing them, barrels to pack them in. It follows, that all the testimony respecting his not renting or occupying buildings on the docks, or apartments in the warehouses of the docks, was misdirected and useless.

THE JARRIAT BOX.

A freezing box like Exhibit D was made for Davis in the spring of 1857 *by Peter Jarriat.*

Peter Jarriat [folio 232] says that he became acquainted with William Davis in the fall of 1856; that during that fall he made a capstan for him; that in the spring of 1857 he made a box for him about 4 feet long, 3 feet wide, and something like 2 feet 10 inches in height; that Davis gave him the dimensions to make it; that the box had double walls, with filling of sawdust between them; that there was a partition of tin in the inside; that the space divided off by the tin was 10 to 12 inches wide, and that the part so partitioned off was covered with a lid separate from the lid by which the whole box was covered; that this box was like model Exhibit D; that there didn't appear to be any communication between the two apartments of the box.

This testimony is positive, and the subject matter of it is such that the witness cannot be mistaken about it.

That he made this box, and for Davis, and under his directions, there cannot be a doubt. The correctness of the witness as to the *time* he made it, is attacked by the Appellant, but if the attack be successful as to the time, it only proves that the witness made that box one year earlier, that is in the spring of 1856, and both Sprague and Rowley testify that Davis was in Detroit in the summer of 1856, and using such a box there to freeze fish to send south. It is not, therefore, improbable that he was there in the spring of 1856.

Jarriat [folio 234] says that in the summer of the year when he made the box he lost a child. Now, it must be conceded, and the Appellant does concede in the testimony that the witness would well remember that the making of the box and the loss of the child occurred in the same year, but he might not so well remember what year it was.

The Appellant says, and has attempted to prove by the custodian of the church records where the child was buried, that the loss of the child was in the summer of 1856. Well, if they are right, the result is that the box was made in 1856 instead of 1857.

The Appellant attempted to discredit this testimony of Jarriat, by proving that he did not, at the time of making the box, live where he said he did, but in this he signally failed. The Appellant's witness for this purpose was William Burke.

Jarriat, on his cross-examination [folios 235 and 236], says that at the time he made the box he lived on Miami avenue, he believes No. 50, and that A. Tuttle was agent for the house.

Burke says [folio 73] that he purchased a house which was on the east half of lot 19, in Miami avenue, on May 28, 1857, and that he never knew a man by the name of Peter Jarriat, and says that he did not know of such a man living in that house in the spring of 1857; but he says also that he did not move into it in 1857; that it was a double house; that when he bought it in 1857, there were two families living in it; that he don't know who they were, and that he only knows that Mrs. Tyler lived in the part which he afterwards occupied. Obviously there is nothing in the testimony of this witness tending to show that Jarriat did not occupy a part of that house in 1857. The only circumstance tending to show that it might have been in 1856 instead of 1857, was the fact that Tuttle was the agent of the house when Jarriat lived there, and the fact that Burke bought it in the spring of 1857. This might raise a presumption that Tuttle ceased to be the agent of the house when he sold it to Burke, but very likely he continued to be the agent of it for Burke.

I will now refer to a piece of testimony which is direct, positive and uncontradicted, and in reference to a circumstance about which the witness could not be mistaken. It is the testimony of Robert Keith, of Cincinnati. At folio 279, this witness testifies that in the spring (and on his cross-examination [folio 280], he says in March,) of 1858, Davis shipped from Detroit to him in Cincinnati, two barrels of artificially frozen fish. That in two days after Davis came on to Cincinnati, and saw witness selling the fish, and conversed with him as to how they had been frozen, and said they had been frozen five months.

USE OF THE PROCESS BY DAVIS AT ADRIAN, MICHIGAN.

Davis, personally, and by Mitchell, an employee, used, at this place, in the spring of 1857, a box from four to five feet long, two and a half feet deep, and about three feet wide, with two separate apartments, not connected with each other, with a separate lid to each apartment, and an additional lid to cover both apartments. The partition between these apartments was made of tin. In one compartment, about eight inches across, the freezing mixture was placed, and in the other compartment the fish to be preserved were placed. They usually put a barrel of fish in the box at a time. Mitchell used it there for a period of six weeks, and Davis was using it there before Mitchell commenced. They preserved fish in this box as long as three days at a time. They were not frozen, but they were preserved. These facts are testified to by A. D. Mitchell [folio 337 to 340], and they are not in any way contradicted, nor was there any attempt to contradict them. They stand, therefore, as facts proven, and in case preserving by such an apparatus without freezing, as well as with freezing, is included in the patent, they alone, independently of any other testimony, show that the process patented was old, and that the patent is null and void.

This piece of testimony constitutes a much stronger defence than what has been held sufficient to defeat a patent. It has been several times decided that, even going no farther than completing one machine *ready* for use is sufficient to ante-date a subsequent invention ; and this even in the absence of proof that it went into practical operation at all.

Parker *v* Ferguson, 1 Blatch., 407.
Whitely *v* Swayne, 7 Wall., 685.
Agawam Co. *v* Jordan, 7 Wall., 584.
Coffin *v* Ogden, 18 Wall., 120.

In considering this piece of testimony, it must be borne in mind that the patent is not limited to freezing or preserving in a frozen state, but the patent is broadly for "preserving in a close chamber, by means of a freezing mixture having no contact with the atmosphere of the preserving chamber."

Now, did not Davis and Mitchell do exactly this thing at Adrian, and with exactly those instrumentalities? They certainly had the fish in one compartment, and the freezing mixture in another compartment, and the freezing mixture certainly had no contact with the atmosphere of the preserving chamber, and that is all there is of it. This evidence alone, therefore, is a full and complete answer to the Appellant's case.

THE PATENT OF DAVIS.

This patent was granted to Wm. Davis on the 16th of June, 1868, many years after, as the proof shows, he had been in the habit of freezing and preserving articles by means of freezing mixtures, and in a chamber or apartment having no communication with the freezing mixture apartment.

The question has been asked by the Appellant why, if Davis was so early in use of the process, did he not earlier apply for a patent. The answer to this inquiry explains—

1st. Davis did not understand that he was practicing any novelty, but supposed that he was doing what had long been done with the old ice cream freezer, and neither he nor any one working with him, supposed there was anything about it that was patentable. He so told Sprague.

2d. He never did apply for or receive a patent for that process, or broadly, for any apparatus to work that process.

3d. He was endeavoring to get a plan of an apparatus having a different mode of operation, and one which would transfer the injurious vapor from the preserving chamber.

4th. He finally succeeded in hitting upon a plan which would do it, and then he applied for and obtained his patent.

He saw that by operating upon fish and other articles in that way, the way he had been practicing, the most of the injurious vapor, instead of being removed from the article, was frozen fast within it. This he wished to obviate; he believed that it would improve meats to have the injurious vapor extracted from them and carried to some place of deposit, instead of being frozen fast in them; besides, there were many articles, such as fruits, etc., which he wished to preserve by preventing the contaminating effect of such vapor, without freezing. This is what he wished to attain, and this was what he was experimenting to accomplish. He said to himself (his patent shows it), if I can devise an apparatus by which a current of air shall be produced, moving from and returning to the article to be preserved, removing therefrom the noxious vapor, and making a deposit of it somewhere on its circuit, I shall be able to press this air into the service of an obedient vehicle in conveying the injurious vapor from whatever article I wish to operate upon and preserve, whether the article is to be frozen or not, and this will be of great use to all articles, because, even with those to be frozen, much less of the noxious vapor

will be frozen within them than would be without such an operation, and, for articles not to be frozen, it will preserve them longer than any other known means.

What, then, did Davis patent?

In his patent will be found an apparatus described which just accomplishes the purpose which Davis was in pursuit of.

By the apparatus described in his patent, the following conditions are established :—

1st. The vessels for the freezing mixture are located near to the sides of the preserving chamber, leaving a wide space between the vessels for the articles.

2d. There is an opening both over the top and under the bottom of the vessels containing the freezing mixture.

3d. The air will be warmest and lightest at the centre of the preserving chamber.

4th. The coldest and heaviest air will be in the narrow spaces between the ice receptacles and the sides of the preserving chamber.

With these conditions established, it is obvious that the operation will be as follows :—

The air from around the article in the chamber between the ice receptacles will ascend till it strikes the top of the preserving chamber, then, being pressed by the ascending column of warm air, it will move off, laterally, passing through the top spaces at the top of the ice or freezing mixture receptacles; being thus cooled it will descend down along the sides of the ice receptacles, and

through the narrow space between them and the sides of the chamber; as it descends, two things will take place; the air will be cooled by the surface of the ice vessels and consequently deposit its vapor frozen against the cooling surfaces, to wit, the sides of the ice receptacles, the same as dew and frost are formed on leaves; the air thus purified will continue to descend till it reaches the bottom, when it will pass through the openings under the ice receptacles, and out again in the vicinity of the article being operated upon, and its capacity for holding vapor being there restored by rarefaction, and having thus discharged its previous cargo of vapor, it will take on another load and proceed as before, and so on until the foul vapor is largely carried away from the article and frozen upon the sides of the ice receptacles.

This invention of Davis' is obviously a very useful one, and the operation carried on by it a very beautiful one. His patent, in which his experiments culminated, taken in connection with the testimony, showing what was the object of his experiments, is sufficient to prove, beyond the possibility of a doubt, that he was not experimenting to discover the simple thing which Piper patented, and which he (Davis) had so long practiced as having no novelty.

GEORGE GIFFORD,

Counsel for Appellees.